INDEX

325-839—62——1

[1] [1]

[2] Before Federal Trade Commission

Docket 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Complaint—September 4, 1958

The Federal Trade Commission, having reason to believe that the above-named respondent has violated Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Section 13), hereby issues its complaint as follows:

PARAGRAPH ONE: Respondent Jantzen, Inc., is a Nevada corporation with its offices and place of business located at Jantzen Center, 411 N.E. 19th Avenue, Portland 8, Oregon.

PARAGRAPH TWO: Respondent is principally engaged in the manufacture, distribution, and sale of clothing such as summer wear, sweaters, and children's wear.

PARAGRAPH THREE: These products are sold by respondent for use, or resale within the United States. Respondent causes them to be shipped and transported from the State of location of their principal place of business to purchasers located in States other than the State wherein shipment or transportation originated.

Respondent maintains a course of trade in commerce in such products among and between the States of the United States.

PARAGRAPH FOUR: Respondent ships and sells throughout the United States and world markets to some twelve thousand active accounts. Respondent is licensed to do business in eight states, four in the western United States and four in the eastern United States. Distribution is exclusively to retailers located in the various market areas throughout respondent's territories, and sales to retailers are made direct.

Respondent's annual volume of sales for the fiscal year ending August 31, 1957 was in excess of $44 million dollars.

[3] . PARAGRAPH FIVE: Respondent, in the course and conduct of its business in commerce, has been paying advertising allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of its products.

For example, respondent has for several years utilized standard printed cooperative newspaper agreements covering summer wear lines and sweater lines under which, in accordance with specified conditions, respondent pays fifty percent of advertising costs to the limit of five percent of the favored purchasers' total net purchases provided the initial order of a season for the merchandise involved amounts to $5,000.00 or more.

Such allowances were not made available on proportionally equal terms by respondent to other purchasers competing in the resale of respondent's products with those receiving the allowances.

PARAGRAPH SIX: The foregoing acts and practices of respondent, as alleged, violate Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Section 13).

WHEREFORE, THE FEDERAL TRADE COMMISSION, the Federal Trade Commission on this 4th day of September, A.D. 1958, issues its complaint against said respondent.

Notice

Notice is hereby given to the respondent hereinbefore named that the 18th day of November, A.D. 1958, at 10 o'clock is hereby fixed as the time and Portland, Oregon as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirteenth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

[4] If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to the facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 4th day of September, 1958.

By the Commission.

ROBERT M. PARRISH,
Secretary.

[5] Before Federal Trade Commission

[Title omitted]

Order Designating Hearing Examiner

Pursuant to authority vested in the Federal Trade Commission and delegated to the Director, Hearing Examiners,

It is ordered that Loren H. Laughlin, a hearing examiner of this Commission, be, and he hereby is, designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law.

EARL J. KOLB,
Acting Director,
Hearing Examiners.

[6] Before Federal Trade Commission

[Title omitted]

Order Cancelling Initial Hearing—November 14, 1958

Because of the pendency of negotiations for consent order and of conflict in the hearing examiner's calendar,

IT IS ORDERED that the initial hearing herein set forth in the "Notice" portion of the complaint for November 18, 1958, in Portland, Oregon, be and the same hereby is canceled, subject to being reset on ten days' notice to the parties.

LOREN H. LAUGHLIN,
Hearing Examiner.

NOVEMBER 14, 1958.

[7] Before Federal Trade Commission

[Title omitted]

Agreement Containing Consent Order To Cease and Desist—November 10, 1958

The agreement herein by and between Jantzen, Inc., respondent in Docket No. 7247, by its duly authorized officer and attorney, and Franklin A. Snyder, counsel supporting the complaint, subject to approval by the Bureau of Litigation, Federal Trade Commission, is entered into in accordance with Section 3.25 of the Rules of Practice and Procedure of the Commission. In accordance therewith the parties hereby agree that:

1. Respondent Jantzen, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at Jantzen Center, 411 N.E. 19th Avenue, Portland 8, Oregon.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 4, 1958, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

[8] b. The making of findings of fact or conclusions of law; and

c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Order

It is ordered that respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with the sale of clothing in commerce as "commerce" is defined in the amended Clayton Act do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of any customer of respondent as compensation, or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Signed this 10th day of November, A.D., 1958.

JANTZEN, INC.
By D. E. KENNEDY,
Vice President.

[9] JANTZEN, INC.,
Box 3300, Portland 8, Oreg.

LEE FINDERS,
Attorney for Respondent.

FRANKLIN A. SNYDER,
Counsel Supporting Complaint.

Approved:

ROBERT R. MACIVER,
Assistant Director,
Bureau of Litigation,

JOSEPH E. SHEELEY,
Director,
Bureau of Litigation.

[10] Before Federal Trade Commission

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Initial Decision of Hearing Examiner—December 2, 1958

Loren H. Laughlin, Hearing Examiner.
Franklin A. Snyder, for the Commission.
Lee Finders, Portland, Oregon, for the Respondent.

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondent with having violated the provisions of § 2(d) of the amended Clayton Act (U.S.C. Title 15, § 13) in certain particulars.

On November 25, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into and between respondent and the attorneys for both parties, under date of November 10, 1958, subject to the approval of the Bureau

of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Jantzen, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of [11] business located at Jantzen Center, 411 N.E. 19th Avenue, Portland 8, Oregon.

2. Pursuant to the provisions of the Clayton Act as amended, the Federal Trade Commission, on September 4, 1968, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and

effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order. [12] Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," said agreement is hereby approved and accepted and is ordered filed if and when said agreement shall have become a part of the Commission's decision. The hearing examiner finds from the complaint and the said agreement that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondent; that the complaint states legal causes for complaint under the Federal Trade Commission Act, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order, therefore, should be and hereby is entered as follows:

ORDER

IT IS ORDERED that respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

LOREN H. LAUGHLIN,
Hearing Examiner.

DECEMBER 2, 1958.

[13] Before Federal Trade Commission

Commissioners: JOHN W. GWYNNE, *Chairman*, ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, EDWARD T. TAIT.

In the Matter of

JANTZEN, INC., A CORPORATION

Decision of the Commission and Order To File Report of Compliance—January 16, 1959

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 16th day of January, 1959, become the decision of the Commission; and, accordingly:

IT IS ORDERED that respondent Jantzen, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission.

ROBERT M. PARRISH,
Secretary.

ISSUED: JANUARY 16, 1959.

[14] Before Federal Trade Commission

[Title omitted]

Joint Motion to Amend Decision

For the purpose of correcting minor errors in the initial decision in this matter which became the decision of the Commission on January 16, 1959, counsel for all parties jointly move the Commission to amend said decision by:

Substituting the phrase "the Clayton Act" for "the Federal Trade Commission Act" in line 10 in the unnumbered paragraph immediately preceding the Order in said initial decision.

It is agreed that this complaint was issued pursuant to the provisions of the Clayton Act as stated in paragraph 2 of said initial decision, rather than the Federal Trade Commission Act, as erroneously stated in the Agreement Containing Consent Order to Cease and Desist.

Respectfully submitted,

LEO FINDERS,
Attorney for Respondent.

FRANKLIN A. SNYDER,
Counsel Supporting Complaint.

[15] Before Federal Trade Commission

[Title omitted]

Order Granting Motion, Reopening and Modifying Decision—March 20, 1959

This matter having come on to be heard upon the joint motion of the respondent and counsel in support of the complaint requesting the Commission to correct an error in the decision herein by substituting the phrase "the Clayton Act" for "the Federal Trade Commission Act" in line 10 in the unnumbered paragraph immediately preceding the order in such decision, the parties having agreed that the complaint in this matter was issued pursuant to the provisions of the Clayton Act rather than the Federal Trade Commission Act; and

It appearing that the requested correction should be made:

IT IS ORDERED that the aforementioned joint motion of the parties be, and it hereby is, granted.

IT IS FURTHER ORDERED that this matter be, and it hereby is, reopened for the purpose of correcting the decision.

IT IS FURTHER ORDERED that the decision in this proceeding be, and it hereby is, corrected and modified by substituting the words "the Clayton Act" for the words "the Federal Trade Commission Act" appearing in [16] line 10 in the unnumbered paragraph immediately preceding the order contained in such decision.

By the Commission.

ROBERT M. PARRISH,
Secretary.

ISSUED: MARCH 26, 1959.

[17] Before Federal Trade Commission

[Title omitted]

Resolution and Order Directing an Investigation as to Whether Jantzen, Inc., Has Complied With Order To Cease and Desist—July 22, 1964

WHEREAS, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13, the Federal Trade Commission on January 16, 1959, after due process and proceedings of record herein and in accordance therewith, issued and served upon the respondent named in the caption hereof, an order to cease and desist under subsection (d) of Section 2, thereof; and

WHEREAS, by the said order to cease and desist the respondent Jantzen, Inc., and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from—

> [P]aying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration, for any services or facilities furnished by or through such customer in connection [18] with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products; and

WHEREAS, the said order to cease and desist, as modified on March 26, 1959, has not at any time thereafter been modified or set aside and is now, and has at all times since March 26, 1959, been in full force and effect; and

WHEREAS, the Commission has reason to believe that respondent, its officers, representatives, agents and employees, while engaged in the sale and distribution of clothing in commerce, may have violated the provisions of the said order to cease and desist; and

WHEREAS, it is deemed by the Commission to be in the public interest to ascertain whether or not and the extent to which respondent, while engaged in commerce, may have violated the provisions of the said order to cease and desist;

NOW, THEREFORE, IT IS RESOLVED AND ORDERED, that a non-public investigational hearing be conducted for that purpose pursuant to Section 1.35 and related sections of the Commission's Rules of Practice.

IT IS FURTHER RESOLVED AND ORDERED, that the Chief Hearing Examiner hereby appoint and designate a hearing examiner to preside at such hearing with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice, except that of making and filing an initial decision; and upon completion of the hearing, that the hearing examiner shall certify the record to the Commission with his report on the investigation; and that respondent shall have the right of due notice, of cross-examination, of production of evidence in rebuttal, and that the hearing shall be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

IT IS FURTHER RESOLVED AND ORDERED, that the hearings shall be held at such time and at such places as may be necessary, the initial hearing to be held at a place to be fixed by the said hearing examiner on a day occurring at least thirty (30) days after the service of notice thereof upon respondent.

[19] IT IS FURTHER RESOLVED AND ORDERED, that the Secretary shall cause service of this resolution and order to be made on respondent.

By the Commission.

JOSEPH W. SHEA,
Secretary.

ISSUED: JULY 22, 1964.

[20] Before Federal Trade Commission

[Title omitted]

Order Appointing and Designating Hearing Examiner

Pursuant to authority vested in the Federal Trade Commission and delegated to the Director, Hearing Examiners and

in conformance with order of the Commission issued July 22, 1964, directing that a nonpublic investigational hearing be conducted pursuant to Section 1.35 and related sections of the Commission's Rules of Practice, to ascertain whether respondent has violated the provisions of its order to cease and desist issued March 26, 1959, and that a hearing examiner be delegated to preside at such hearing.

It is ordered that Eldon P. Schrup, a hearing examiner of this Commission, be, and he hereby is, designated to preside at such hearings with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice consonant with the aforesaid order.

EDWARD CREEL,
Acting Director,
Hearing Examiners.

[21] Before Federal Trade Commission

[Title omitted]

Order Setting Investigational Hearing—October 12, 1964

Pursuant to the July 22, 1964 Federal Trade Commission Resolution And Order Directing An Investigation As To Whether Jantzen, Inc., Has Complied With Order To Cease And Desist" issued in Docket No. 7247 and now and since March 26, 1959 stated in said resolution and order to be at all times in full force and effect,

It is ordered that a non-public investigational hearing be held, to commence at 10:00 a.m., November 30, 1964, in the Court of Appeals Courtroom, United States Court House, Broadway and Main Streets, Portland, Oregon, for the purpose of taking testimony and other evidence concerning the nature and extent of compliance by Jantzen, Inc., with the order to cease and desist in Docket No. 7247, In the Matter of Jantzen, Inc., a corporation.

ELDON P. SCHRUP,
Hearing Examiner.

OCTOBER 12, 1964.

[22] Before Federal Trade Commission

[Title omitted]

Order Setting Prehearing Conference—November 18, 1964

By agreement between counsel and pursuant to Section 3.8 of the Rules of Practice for Adjudicative Proceedings,

It is ordered that this matter be set for a prehearing conference, to commence on November 23, 1964, at 10:30 a.m., in Room No. 7316, Federal Trade Commission Office, The 1101 Building, 11th Street and Pennsylvania Avenue, N.W., Washington, D.C., and that counsel for all parties meet with the Hearing Examiner for such conference at the aforesaid time and place. This conference will be stenographically reported.

ELDON P. SCHRUP,
Hearing Examiner.

NOVEMBER 18, 1964.

[23] Before Federal Trade Commission

[Title omitted]

Order Cancelling Hearing, Quashing Subpoenas, and Closing Proceeding Before Hearing Examiner—November 23, 1964

During the course of a prehearing conference held herein on November 23, 1964 in Washington, D.C., Commission counsel submitted a motion to close this proceeding before the Hearing Examiner together with an attached stipulation signed by Commission counsel and counsel for Jantzen, Inc. The said motion and stipulation made of record herein provide for the cancellation of the non-public investigational hearing heretofore set for Portland, Oregon on November 30, 1964 and the quashing of the subpoena issued to officials of Jantzen, Inc. requiring their attendance at said hearing. Accordingly,

It is ordered that:

(1) The non-public investigational hearing herein heretofore set for Portland, Oregon on November 30, 1964 be, and the same hereby is, cancelled.

(2) The subpoena *ad testificandum* issued on October 12, 1964 and addressed to Bruce Sturm, Advertising Manager, Jantzen, Inc., Post Office Box 3300, Portland,

Oregon, to appear and testify at the above Portland hearing, be quashed, and Mr. Sturm is excused from such appearance.

(3) The subpoena *duces tecum* addressed to Donald E. Kennedy, Vice President, Jantzen, Inc., Post Office Box 3300, Portland, Oregon, to appear, testify and produce documentary evidence at the above Portland hearing, be quashed, and Mr. Kennedy is excused from such appearance and making the said return.

[24] (4) The record in this proceeding before the Hearing Examiner be, and the same hereby is, now closed.

ELDON P. SCHRUP,
Hearing Examiner.

NOVEMBER 23, 1964.

[25] Before Federal Trade Commission

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Report and Certification to the Commission of Record of Investigational Hearing—January 14, 1965

ELDON P. SCHRUP, *Hearing Examiner.*

EDWARD G. GRUIS, ESQ., GERALD T. GREGORY, ESQ., *Counsel for the Commission.*

EDWIN S. ROCKEFELLER, ESQ., *Weld, Harkrader and Rockefeller, Counsel for the Respondent.*

I

THE ORDER TO CEASE AND DESIST

The initial decision herein, based on an agreement containing consent order to cease and desist entered into by respondent Jantzen, Inc., was adopted as the decision of the Commission on January 16, 1969 and is reported in 55 FTC 1065. In brief, the complaint in this consent matter charges the said respondent Portland, Oregon, clothing manufacturer, with

annual sales allegedly in excess of $44,000,000 for the fiscal year ending in 1957, to have violated Section 2(d) of the amended Clayton Act in its manner of granting advertising allowances to purchasers of respondent's products for competitive resale. The complaint alleges Jantzen, Inc. ships and sells throughout the United States and in world markets to some 12,000 active accounts, and the consent order to cease and desist provides as follows:

[26] "IT IS ORDERED, That respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as 'commerce' is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products."

II

STATEMENT OF THE PROCEEDING

The Commission, on July 22, 1964, resolved and ordered that a non-public investigational hearing be conducted to ascertain whether or not and the extent to which respondent Jantzen, Inc., while engaged in the sale and distribution of clothing in commerce, may have violated the provisions of the order to cease and desist issued against the said respondent and stated in said resolution and order to be at all times in full force and effect since modified on March 26, 1959.

The resolution and order further provided that the investigational hearing should be conducted in accordance with the Commission's Rules of Practice for Adjudicative Proceedings insofar as applicable, that no initial decision was to be made or filed, and that the hearing examiner, upon completion of the hearing, should certify the record to the Commission with his report on the investigation.

Pursuant to said Commission resolution and order, the undersigned hearing examiner, by order issued October 12, 1964, set a non-public investigational hearing to commence on November 30, 1964 in Portland, [27] Oregon for the purpose of taking testimony and evidence concerning the nature and extent of compliance by Jantzen, Inc. with the said order to cease and desist. Upon the application of Commission counsel, a subpoena ad testificandum and a subpoena duces tecum were at such time also issued to two officials of the respondent for their appearance at the said hearing.

Under date of November 18, 1964 and by agreement between counsel, a prehearing conference was ordered herein for Washington, D.C. on November 23, 1964 in advance of the Portland hearing. During the course of this conference a stipulation signed by respective counsel and an agreed to motion to close the proceedings before the hearing examiner were submitted and incorporated into the record and the conference was adjourned. On November 23, 1964 order issued as requested by the parties cancelling the non-public investigational hearing set for Portland, Oregon; quashing the subpoenas directed to the respondent's officials and excusing their appearance; and closing the record in the proceeding.

III

Report on the Record of the Investigational Hearing

The record of the investigational hearing consists of the forty-one (41) page transcript of the prehearing conference held in Washington, D.C. on November 23, 1964. Incorporated in the record at the direction of the hearing examiner by consent of the respective parties is the following stipulation signed by all counsel and set forth at pages 9–12 of the said transcript:

"Stipulation

Pursuant to the Resolution and Order of the Federal Trade Commission (Commission), dated July 22, 1964, directing an investigational hearing to determine whether or not Jantzen, Inc. (Respondent), has complied with provisions of the Commission's order to cease and desist, issued on [28] January 16, 1959, and modified on March 26, 1959; and in connection with

the Hearing Examiner's Order herein, dated October 12, 1964, setting the time and place to commence the investigational hearing, and the subpoenas issued herein by the Hearing Examiner to Donald E. Kennedy, Vice President of Jantzen, Inc., and Bruce Sturm, Advertising Manager for Jantzen, Inc.;

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the following is a true statement of facts:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as 'commerce' is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer, Loveman's, 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

[20] 3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by or through such

customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

IT IS HEREBY FURTHER STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the above admissions of order violations by respondent make unnecessary:

1. Compliance with the said subpoenas issued herein and counsel for the Commission and counsel for the Respondent agree and consent to having said subpoenas quashed.

2. Continuation of hearings herein to determine whether or not respondent has complied with the said order to cease and desist, and counsel for the Commission and counsel for the Respondent agree and consent to having all further hearings before the Hearing Examiner in this proceeding closed."

(Signatures.)

The foregoing stipulation of record shows that respondent Jantzen, Inc., in the course of its business in commerce, has admittedly failed to comply with the provisions of the order to cease and desist hereinbefore set forth, to the extent as follows:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer Loveman's, 800 Market Street, Chattanooga, Tennessee.

[30] (b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

The stipulation further states and the respondent admits that it made the foregoing advertising or promotional allowance payments without making such payments available on proportionally equal terms to all other customers competing in the distribution of the respondent's products with the aforementioned and other favored customers, and in so doing, that respondent has failed to comply with the provisions of the said order to cease and desist.

The Commission's attention is directed to the fact that the record further discloses at page 13 of the said transcript that, while counsel for the respondent has agreed to and signed the foregoing stipulation, said counsel has taken the position that "Jantzen does not concede either (1) that what the Commission has designated as an order to cease and desist of January 11, 1959 as modified March 26, 1959, was ever an effective order to cease and desist as provided by the law nor (2) that if the so-called 'order' was ever in fact a valid one provided by law, that there is at this time any method provided in law for the enforcement of such 'order.'" Counsel for the respondent continues his argument and elaborates on the position contended for at pages 14–17 of the transcript. Counsel for the Commission, at page 24 of the transcript, states his understanding of respondent's position on the Commission's jurisdiction and adds that he takes no exception to counsel for the respondent reserving his position on jurisdiction.

[31] IV

CERTIFICATION OF THE RECORD TO THE COMMISSION

The investigational hearing having been concluded, the aforedescribed record of the hearing in this matter is hereby certified by the hearing examiner to the Commission in accordance with the Commission Resolution and Order herein of July 22, 1964.

Respectfully submitted,

ELDON P. SCHRUP,
Hearing Examiner.

JANUARY 14, 1965.

[32] Before Federal Trade Commission

[Title omitted]

Application for Disposition of Investigation Under Section 1.21

Respondent Jantzen, Inc., hereby makes application, pursuant to Section 1.21 of the Commission's General Procedures, for informal disposition by the Commission of the investigation directed by its Resolution and Order of July 22, 1964, and for filing without further action of the Report of the hearing examiner dated January 14, 1965.

The requested disposition is appropriate and in the public interest at this time. Respondent has instituted effective procedures for insuring compliance with the order. In November 1963 (and, thus, prior to the Commission's Resolution and Order of July 22, 1964, directing this investigation), Respondent developed the plans and arrangement set forth in the [33] attached affidavit of Respondent's President with four exhibits. Respondent intends to and will comply fully with Section 2(d) of the Clayton Act in the future. Furthermore, this disposition will make it unnecessary to reach two difficult questions which would be presented by further proceedings and which could result in complex, extended, unnecessary litigation:

1. The question of the basic validity of the order to cease and desist of January 16, 1959, as modified March 26, 1959 (see pp. 14 and 15 of Transcript of Proceedings before Hearing Examiner); and

2. The question whether the laws of the United States now provide any method for judicial enforcement of Clayton Act orders to cease and desist issued prior to July 23, 1959 (see pp. 15 and 16 of Transcript).

PRAYER

WHEREFORE Respondent prays that the Commission dispose of this matter informally as provided in Section 1.21 of the Commission's General Procedures. Should the Commission desire, the Respondent is prepared to file, within a time to be

set by the [34] Commission, a full, complete and detailed supplemental report of compliance.

Respectfully submitted,

EDWIN S. ROCKEFELLER,
Wald, Harkrader & Rockefeller,
1825 Nineteenth Street, N.W.,
Washington, D.C. 20036

[35] **Affidavit of Paul DeKoning in Support of Application**

State of Oregon, County of Multnomah, SS.:

I, Paul DeKoning, being first duly sworn, say as follows:

1. I am President and General Manager of Jantzen Inc. and have full knowledge of the facts recited below.

2. In January, 1964, beginning with its 1964 Summerwear Line, in an effort to improve the administration of its cooperative advertising program, Jantzen transferred the administration of this program from its own employees to an independent agency, The Advertising Checking Bureau, in San Francisco, California. A further factor motivating this change in administration was that The Advertising Checking Bureau could serve as a buffer against pressures from favored treatment which are often asserted by retailers.

3. Attached to this Affidavit as Exhibit 1 is a copy of the 1964 Jantzen Sportswear Cooperative Advertising Program which was in effect beginning with Jantzen's 1964 Summerwear Line. A copy of this Program was mailed to each Jantzen sportswear account in November, 1963.

4. After that program had been in effect for approximately seven months, and without any advance notice, warning or opportunity given Jantzen to demonstrate its good faith in the matter, a copy of the Commission's Resolution and Order Directing An Investigation As To Whether Jantzen, Inc. Has Complied With Order To Cease and Desist dated July 22, 1964, was served upon Jantzen.

5. Thereafter, and independent of that action by the Commission, Jantzen made slight further modifications in its cooperative advertising program. Attached to this Affidavit as Exhibits 2 and 3 are copies of the current Jantzen Sportswear Cooperative Advertising Programs which have been in effect since September 1, 1964. A copy of the blue Program, Exhibit

2, was sent to each Jantzen Misses' and Juniors' Sportswear account in September, 1964. A copy of the pink Program, Exhibit 3, was sent to each Jantzen Men's, Students', Boys', Girls' and Teens' account at the same time.

[36] 6. On November 16, 1964, as President of Jantzen Inc., I sent an Inter-Office Memorandum to all Sportswear Sales Managers, Sales Representatives and Advertising Managers. A copy of that Memorandum is attached as Exhibit 4. This directive represents the policy of this Company: to treat all accounts on a proportionately equal basis by adhering strictly and unwaiveringly to the published cooperative advertising program.

7. Jantzen Inc. is doing everything which is reasonably within its power to assure that its executives, managers and other employees comply with the requirements of Section 2(d) of the amended Clayton Act.

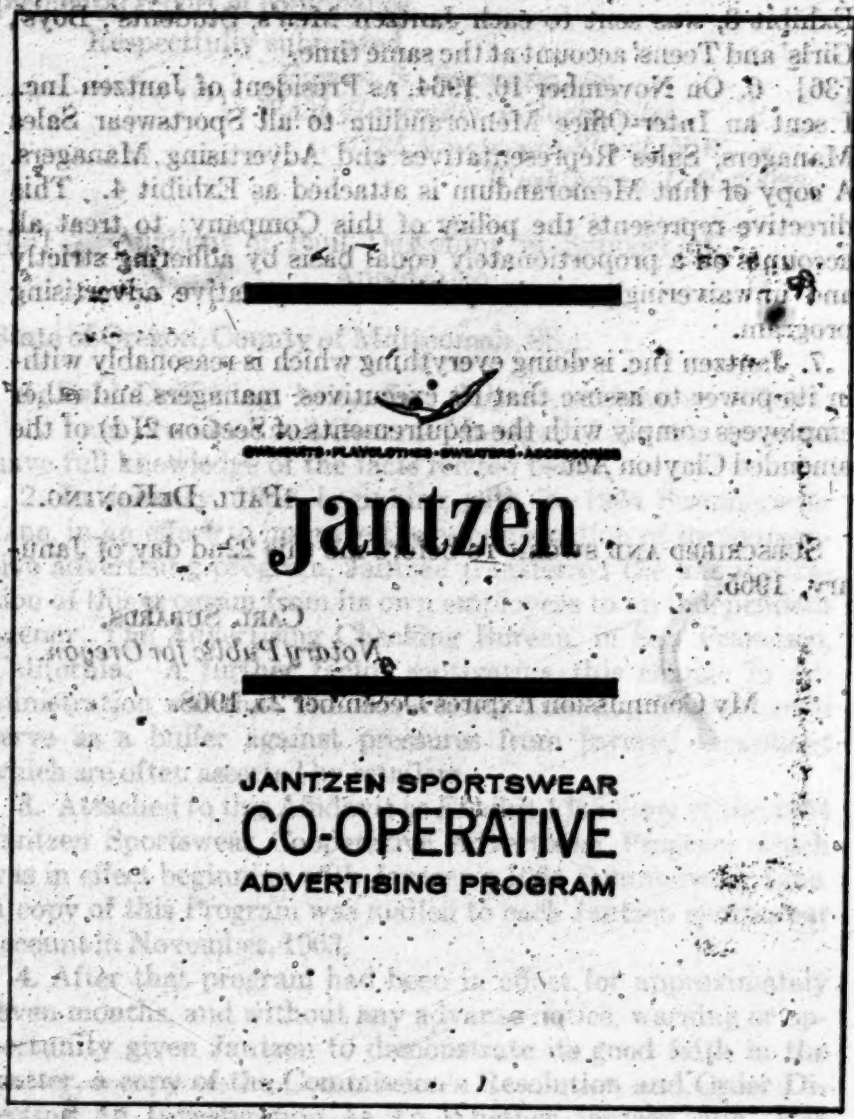
PAUL DEKONING.

SUBSCRIBED AND SWORN TO before me this 22nd day of January, 1965.

CARL SUBARDS,
Notary Public for Oregon.

My Commission Expires December 25, 1968.

[37] **Exhibit "1" to Affidavit**



co-operative advertising program for Jantzen sportswear

MEN'S, BOYS', MISSES', JUNIOR', GIRLS', PRETEENS', AND ACCESSORIES)

In drawing up the Co-operative Advertising Plan for Jantzen Sportswear, simplicity has been a prime consideration. The program becomes effective with the 1964 ruisewear and spring lines.

The purpose of the plan is to enable our retailers to identify themselves with the over-all Jantzen advertising program and to direct the force of it to the store.

The plan is available to all regular Jantzen accounts and newspaper advertising is not based on volume of purchases.

To qualify under this plan an advertisement must:

1. Feature Jantzen products exclusively.

2. Prominently display the Jantzen name or logotype in the heading or body copy in at least 12 point type.

3. Be ⅛ page in size or multiples thereof with a minimum of ⅛ page. (In tabloids the minimum size is ½ page.)

Stores may run ads of ⅛ page, ¼ page, ½ page, ¾ page or full page and be compensated on the following basis:

Less than ⅛ page . . . . No compensation

⅛ to ¼ page . . . . . ⅛ page compensation rate

¼ to ½ page . . . . . ¼ page compensation rate

½ to ¾ page . . . . . ½ page compensation rate

¾ to full page . . . . . ¾ page compensation rate

Full page . . . . . Full page compensation rate

(See compensation rates top right)

4. Appear in audited net paid circulation newspapers.

5. Feature only current season, first quality merchandise bearing the Jantzen label.

The rate of compensation will be based entirely on the circulation of the newspaper in which the advertisement is run. An average rate of payment per thousand circulation has been established for all daily and Sunday newspapers in the United States, divided into four circulation groups.

JANTZEN COMPENSATION RATE PER 1,000 CIRCULATION					
GROUP	CIRCULATION	¼ PAGE (Full Page Through)	½ PAGE (Half Page Spread)	¾ PAGE	FULL PAGE
1.	200,000 and over	$ .37½ per M	$ .75 per M	$1.12½ per M	$1.50 per M
2.	100,000-199,999	$ .50 per M	$1.00 per M	$1.50 per M	$2.00 per M
3.	25,000- 99,999	$ .75 per M	$1.50 per M	$2.25 per M	$3.00 per M
4.	Under 25,000	$1.00 per M	$2.00 per M	$3.00 per M	$4.00 per M

Examples: 250,000 (circulation) × $.37½ per thousand (¼ page) = $93.75 compensation
12,000 (circulation) × $2.00 per thousand (½ page) = $24.00 compensation

THE RATES ARE AVERAGED FOR ALL NEWSPAPERS IN A CIRCULATION GROUP AND CANNOT BE VARIED IN RELATION TO ACTUAL SPACE COST IN ANY SPECIFIED NEWSPAPER. NO ADDITIONAL COMPENSATION WILL BE ALLOWED FOR COLOR ADS.

Ads on cruisewear and spring lines may be run at any time after delivery of the lines but not beyond the 3rd of the following July. Ads on fall and holiday lines may be run at any time after delivery of the lines but not beyond the 24th of the following December. Ads may be run without prior notice or approval.

To collect for newspaper advertising you need only send two full page tear sheets of the ad within 60 days after publication to:

Jantzen Promotion
c/o The Advertising Checking Bureau, Inc.
P. O. Box 3419, Rincon Annex
San Francisco 19, California

If the advertisement meets the specified requirements, a check for the exact amount, determined by the circulation rate table, will be sent by return mail by the Advertising Checking Bureau, Inc. It is not necessary to send invoices.

ADVERTISING CLAIMS ARE NOT TO BE DEDUCTED FROM JANTZEN ACCOUNTS PAYABLE. DO NOT SEND INVOICE OR CLAIM TO JANTZEN. Claims can only be accepted and processed by The Advertising Checking Bureau. Claims for advertisements cannot be accepted if any one of the listed requirements is not met. This offer is subject to change or cancellation upon 15 days written notification.

Any request for an exception to this program will be submitted to the Federal Trade Commission for its approval.

OUTDOOR POSTERS, RADIO, TELEVISION, & CATALOGS

In instances where stores use any or all of these media, Jantzen will pay 50% of the actual cost. However, all of these items taken together shall not exceed 2% of the account's purchases for the season. Accounts which wish to use any of these media must submit their plans to Advertising Dept., Jantzen Inc., P. O. Box 3001, Portland, Oregon 97208, for prior approval.

JANTZEN

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES ONLY:

MISSES', JUNIORS' AND RELATED ACCESSORIES

[41] Exhibit "2" Affidavit

Jantzen

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES **ONLY:**

MISSES', JUNIORS', AND RELATED ACCESSORIES

[42]

co-operative advertising program for Jantzen sportswear

(MISSES', JUNIORS', AND RELATED ACCESSORIES ONLY)

In drawing up this revision of the Co-operative Advertising Plan for Jantzen sportswear, simplicity and flexibility have continued as prime considerations. This plan replaces the one issued November 1, 1963 and becomes effective September 1, 1964.

The purpose of the plan is to enable our retailers to identify themselves with the over-all Jantzen advertising program and to direct the force of it to the store.

The plan is available to all regular Jantzen accounts and newspaper advertising is not based on volume of purchases.

To qualify under this plan an advertisement must:

1. Feature Jantzen products exclusively.
2. Prominently display the Jantzen logotype in 30-pt. type size or larger or in a type size not smaller than the largest type size used for the store name in the advertisement if the store name is less than 30-pt. type in size.
3. Be not less than ¼ page in size. (In tabloids the minimum size is ½ page.)

Stores may run ads of ¼ page, ½ page, ¾ page or full page and be compensated on the following basis:

Less than ¼ page .....No compensation
¼ to ½ page .....¼ page compensation rate
½ to ¾ page .....½ page compensation rate
¾ to ⅞ page .....¾ page compensation rate
⅞ page to full page ...Full page compensation rate

4. Appear in A.C.B. daily and Sunday newspapers. (Consideration will be given to other media which do not meet this requirement but prior approval must be obtained.)
5. Feature only current season, first quality merchandise bearing the Jantzen label. Jantzen will not participate in the cost of ads for close-outs, discontinued merchandise, seconds or irregulars.

The rate of compensation will be based entirely on the circulation of the newspaper in which the advertisement is run. An average rate of payment per thousand circulation has been established for all daily and Sunday newspapers in the United States, divided into four circulation groups.

(see compensation rates top right)

[43]

[42]

JANTZEN COMPENSATION RATE PER 1,000 CIRCULATION					
GROUP	CIRCULATION	¼ PAGE (½ Page Tabloid)	½ PAGE (Full Page Tabloid)	¾ PAGE	¾ Page to FULL PAGE
1.	200,000 and over	$ .37½ per M	$ .75 per M	$1.12½ per M	$1.50 per M
2.	100,000 - 199,999	$ .50 per M	$1.00 per M	$1.50 per M	$2.00 per M
3.	25,000 - 99,999	$ .75 per M	$1.50 per M	$2.25 per M	$3.00 per M
4.	Under 25,000	$1.00 per M	$2.00 per M	$3.00 per M	$4.00 per M

Examples: 200,000 (circulation) x $.37½ per thousand (¼ page) = $93.75 compensation
12,000 (circulation) x $2.00 per thousand (½ page) = $24.00 compensation

The rates are averaged for all newspapers in a circulation group and cannot be varied in relation to actual space cost in any specified newspaper.

COLOR ADS

Where color is used the above rates of compensation will be increased by an additional amount equal to 50% of the actual color surcharge made by the newspaper.

HOW TO COLLECT FOR ADS

To collect for newspaper advertising you need only send two full page tear sheets of the ad within 30 days after publication to:

The Advertising Checking Bureau, Inc.
Jantzen Section
P. O. Box 3419, Rincon Annex
San Francisco 19, California

If the advertisement meets the specified requirements, a check for the exact amount, determined by the circulation rate table, will be sent by return mail by the Advertising Checking Bureau, Inc. It is not necessary to send invoices.

Advertising claims are not to be deducted from Jantzen accounts payable. Do not send bookkeeping claims to Jantzen. Claims can only be accepted and processed by the Advertising Checking Bureau. Claims for advertisements cannot be accepted if any one of the listed requirements is not met.

OUTDOOR POSTERS, RADIO, TELEVISION AND CATALOGS

In instances where stores use any or all of these media, Jantzen will pay 50% of the actual cost. However, all of these items taken together shall not exceed 2% of the account's net purchases for the season. Accounts which wish to use any of these media must submit their plans to Advertising Dept., Jantzen Inc., P. O. Box 3001, Portland, Oregon 97208, for prior approval.

Any request for an exception to this program would have to be submitted to the Federal Trade Commission for its approval.

This program is subject to change or cancellation upon 15 days written notification.

JANTZEN

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES ONLY:

MEN'S, STUDENTS', BOYS',

GIRLS', TEENS' AND RELATED ACCESSORIES

Jantzen

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES **ONLY:**

MEN'S, STUDENTS', BOYS',
GIRLS', TEENS' AND RELATED ACCESSORIES

co-operative advertising program for Jantzen sportswear

(MEN'S, STUDENTS', BOYS', GIRLS', TEENS', AND RELATED ACCESSORIES ONLY)

In drawing up this revision of the Cooperative Advertising Plan for Jantzen sportswear, simplicity and flexibility have continued as prime considerations. This plan replaces the one issued November 1, 1963 and becomes effective September 1, 1964.

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To qualify under this plan an advertisement must:

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2. Prominently display the Jantzen logotype in 30-pt. type size or larger or in a type size not smaller than the largest type size used for the store name in the advertisement if the store name is less than 30-pt. type in size.
3. Be not less than ⅛ page in size, (in tabloids the minimum size is ¼ page.) Stores may run ads of ⅛ page, ¼ page, ½ page, ¾ page or full page and be compensated on the following basis:

Less than ⅛ page ..... No compensation
⅛ to ¼ page .... ⅛ page compensation rate
¼ to ½ page .... ¼ page compensation rate
½ to ¾ page .... ½ page compensation rate
¾ to ⅞ page .... ¾ page compensation rate
⅞ to full page .... Full page compensation rate

4. Appear in A.C.B. daily and Sunday newspapers. (Consideration will be given to other media which do not meet this requirement but prior approval must be obtained.)
5. Feature only current season, first quality merchandise bearing the Jantzen label. Jantzen will not participate in the cost of ads for close-outs, discontinued merchandise, seconds or irregulars.

The rate of compensation will be based entirely on the circulation of the newspaper in which the advertisement is run. An average rate of payment per thousand circulation has been established for all daily and Sunday newspapers in the United States, divided into four circulation groups.

(see compensation rates top right)

JANTZEN COMPENSATION RATE PER 1,000 CIRCULATION						
GROUP	CIRCULATION	¼ PAGE ([illegible])	½ PAGE ([illegible])	¾ PAGE ([illegible])	¾ PAGE	¾ PAGE to FULL PAGE
1.	200,000 and over	$ .18¾ per M	$ .37½ per M	$ .75 per M	$1.12½ per M	$1.50 per M
2.	100,000 - 199,999	$ .25 per M	$ .50 per M	$1.00 per M	$1.50 per M	$2.00 per M
3.	25,000 - 99,999	$ .37½ per M	$ .75 per M	$1.50 per M	$2.25 per M	$3.00 per M
4.	Under 25,000	$ .50 per M	$1.00 per M	$2.00 per M	$3.00 per M	$4.00 per M

Examples: 250,000 (circulation) × $.37½ per thousand (½ page) = $93.75 compensation
12,000 (circulation) × $2.00 per thousand (½ page) = $24.00 compensation.

The rates are averaged for all newspapers in a circulation group and cannot be varied in relation to actual space cost in any specified newspaper.

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P. O. Box 3419, Rincon Annex
San Francisco 19, California

If the advertisement meets the specified requirements, a check for the exact amount, determined by the circulation rate table, will be sent by return mail by the Advertising Checking Bureau, Inc. It is not necessary to send invoices.

Advertising claims are not to be deducted from Jantzen accounts payable. Do not send invoices or claims to Jantzen. Claims can only be accepted and processed by the Advertising Checking Bureau. Claims for advertisements cannot be accepted if any one of the listed requirements is not met.

RADIO, TELEVISION AND CATALOGS

In instances where stores use any or all of these media, Jantzen will pay 50% of the actual cost. However, all of these items taken together shall not exceed 1% of the account's net purchases for the season. Accounts which wish to use any of these media must submit their plans to Advertising Dept., Jantzen Inc., P. O. Box 3001, Portland, Oregon 97208, for prior approval. [illegible] approval.

This program is subject to change or cancellation upon 15 days written notification.

[48] Exhibit "4" to Affidavit [49]

[redacted]

Advertising Allowance to Retail Accounts

As many of you know, in 1959 we each placed a Cease & Desist Order by the Federal Trade Commission. This Order prohibited us from granting any special favors to our accounts through payments for cooperative advertising. In 1960 we each placed a Cease & Desist Order by the Federal Trade Commission. This Order prohibited us from granting any special favors to our accounts through payments for cooperative advertising.

To the Spring 1963 through 1963, our Cooperative Advertising program allowed stores to receive up to 3% of purchases for newspaper advertising. As a result of a recent FTC investigation of our accounts, we have learned that in some cases we actually exceeded this allowance. We are now faced with a situation where may further violations may cost Jantzen up to $5,000 apiece - possibly deductible money.

You can now cooperative program is designed to treat all retailers fairly, and our legal advisors tell us it is within the law. In a further effort to reduce pressures from certain of our accounts, it is being administered through ACP rather than directly by our Advertising Department. AS MUST STAY WITHIN STRICT

may requests by accounts, by salesmen or by anyone else for a payment which does not fall directly within some published program MUST BE REFUSED. This includes depletion allowances for store window space, advertising for department openings, special store promotions or the like.

Please note this place you at a disadvantage with liberal allowance given by competitors but until these practices are curbed we must rely on selling ability and value plus allowance.

We shall hold accountable each person who deviates from the principles outlined above. We cannot continue to be threatened with charges of violating Federal laws. No one and we must be jeopardizing business even if it may occasionally mean losing "Ma" to a large account.

[redacted]

All Customer Sales Representatives

Paul DeKoning

Advertising Allowances to Retail Accounts

As many of you know, in 1959 we were placed under a Cease & Desist Order by the Federal Trade Commission. This Order prohibited us from granting any special favors to our accounts through payments for cooperative advertising.

In the years 1960 through 1963, our Cooperative Advertising program allowed stores to receive up to 3% of purchases for newspaper advertising. As a result of a recent FTC investigation of our records, we have learned that in some cases we actually exceeded this allowance. We are now faced with a situation where any further violations may cost Jantzen up to $5,000 apiece - non-tax deductible money.

Our new cooperative program is designed to treat all retailers fairly, and our legal advisors tell us it is within the law. In a further effort to reduce pressures from certain of our accounts, it is being administered through ACB rather than directly by our Advertising Department. WE MUST STAY WITHIN THAT PROGRAM.

Any requests by accounts, by salesmen or by anyone else for a payment which does not fall directly within that published program MUST BE REFUSED. This includes requests for payments for store window space, advertising for new store openings, special store promotions or the like.

We realize this may place you at a disadvantage with liberal allowances given by competitors but until these practices are curbed we must rely on selling something more than allowances.

We shall hold accountable each person who deviates from the principles outlined above. We cannot continue to be threatened with charges of violating Federal laws. We can and we must be law-abiding businessmen even if it may occasionally mean saying "No" to a large account.

cc

Copies to: Chuck Pancher
Don Smith
Bill O'Brien
Bob Wirtz
Bob Ludeman
Gregg Millett
Did Condo
John Hamilton
Don Gordon
Bruce Sturm
All Sportswear Sales Representatives

[50] Before the Federal Trade Commission

[Title omitted]

Answer to Application of Respondent for Disposition of Investigation Under Section 1.21—Dated January 29, 1965

Comes now counsel for the Commission in answer to respondent's application, filed pursuant to Section 1.21 of the Commission's General Procedures on January 28, 1965, for the informal disposition of the investigation directed by the Commission's Resolution and Order of July 22, 1964. It is submitted that there is no justification or basis for granting the relief prayed for in the said application, and the Commission is respectfully requested to certify to the United States Court of Appeals for the Ninth Circuit, the Commission's report upon its investigation of alleged violations of the order herein, and to file the attached, proposed "Application for Affirmance and Enforcement of an Order of the Federal Trade Commission."

As support for Commission's denial of said application and its certification to the Court for affirmance and enforcement of the order herein, counsel for the Commission offer the following statement.

[51] 1. Respondent's request for the informal disposition of this matter by "filing without further action" the "Report of the hearing examiner dated January 14, 1965" is inappropriately sought under the informal enforcement procedures of Section 1.21 of the Commission's General Procedures. The voluntary compliance provisions of Section 1.21 deal with the nonadjudicatory disposition of prospective Commission actions and not the settlement of a respondent's non-compliance with an existing Commission order. But even if measured by Section 1.21's prior record and good faith standards, respondent's repeated violations of the Commission's 1959 order to cease and desist (as modified, March 28, 1960) would not entitle respondent to consideration under this Section's informal disposition provisions.

Steps reportedly taken by respondent (see Affidavit and four exhibits attached to respondent's application) more than four and one-half years after issuance of the Docket 7247 order to insure compliance with that order, were not an issue in the investigative hearing herein, and are irrelevant.

2. The non-public investigational hearing ordered pursuant to Commission resolution and order of July 22, 1964, conclusively established, as shown by the hearing examiner's "Report and Certification to the Commission of [52] Investigational Hearing," filed January 14, 1965, that "respondent Jantzen, Inc., in the course of its business in commerce, has admittedly failed to comply with the provisions of the order to cease and desist."

3. The "difficult questions" suggested in respondent's application and the reservations by respondent in the investigational hearing record as to (a) the effectiveness of the Commission's original, modified order, and (b) any method provided in law with the enforcement of such order, are not supported by the law established for the enforcement of pre-1959 Clayton Act orders. *F.T.C. v. Washington Fish and Oyster Co., Inc.*, 271 F. 2d 39 (9th Cir. 1959); *F.T.C. v. Standard Brands, Inc.*, 189 F. 2d 510 (2nd Cir. 1951); *Nash-Finch v. F.T.C., et al.*, 233 F. Supp. 910 (D.C. Minn., 1964) and *F.T.C. v. Pacific Gamble Robinson Company* (Docket 5819) 9th Cir. No. 18260, decree entered November 28, 1962.

As set forth above, respondent's application for the informal disposition of the investigational hearing report showing respondent's violations of the Docket 7247 order is without justification or basis and should be denied. It is also respectfully submitted that the appropriate disposition of the report of respondent's order violations is for the Commission to authorize the Bureau of Restraint of Trade to file, under the general supervision of the Appellate [53] Division of the Office of the General Counsel, in the Court the Commission's certification and the attached application for affirmance and enforcement of the Docket 7247 order. The Commission is also requested to direct that its resolution and order of July 22, 1964, the reports of the hearing examiner and the Commission, and the record of this non-public investigational hearing be made part of the public record herein to permit such documents supporting Commission certification and application for order enforcement to

be filed as part of the public record in the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

EDWARD G. GRIFFIN,
Attorney.

GERALD T. GREGORY,
Attorney.

Dated this 29th day of January 1965.

[54] [Omitted printed page 105–A]

[55–59]

[60] Before Federal Trade Commission

[Title omitted]

Order Denying Respondent's Request for Informal Disposition—April 9, 1965

This matter is before the Commission on the hearing examiner's "Report and Certification of Record of Investigational Hearing", filed January 14, 1965. Respondent filed its application on January 28, 1965, requesting informal disposition of this proceeding under § 1.21 of the Rules of Practice, and Commission counsel, on February 5, 1965, filed their answer in opposition thereto.

The Commission, upon consideration of respondent's application and Commission counsel's answer, has determined that this matter is not suitable for disposition under § 1.21 of the Rules of Practice. Further, the Commission has reviewed respondent's contentions, first, that the consent order to cease and desist of January 16, 1959, and modified March 26, 1959, is invalid, and, second, that there is no statutory method for enforcement of Clayton Act orders issued prior to July 23, 1959. These contentions are without merit. Accordingly,

It is ordered that respondent's "Application For Disposition Of Investigation Under Section 1.21" be, and it hereby is, denied.

By the Commission.

JOSEPH W. SHEA,
Secretary.

Issued: April 9, 1965.

[61] Before Federal Trade Commission

Commissioners: PAUL RAND DIXON, *Chairman;* PHILIP ELMAN, EVERETTE MACINTYRE, JOHN R. REILLY, MARY GARDINER JONES.

Docket No. 7247

In the matter of

JANTZEN, INC., A CORPORATION

Report of the Federal Trade Commission Upon Its Investigation of Alleged Violations of Its Order to Cease and Desist—April 12, 1965

THE PROCEEDINGS

On July 22, 1964, the Commission having reason to believe that Jantzen, Inc., may have violated the provisions of the order to cease and desist issued herein on January 16, 1959, and modified on March 26, 1959, directed that an investigational hearing be conducted pursuant to § 1.35 and related rules of the Commission's Rules of Practice to ascertain the extent to which such violations may have occurred. A hearing examiner of the Commission was duly designated to preside at hearings to be conducted for that purpose and it was directed that he, in lieu of rendering an initial decision upon completion of the hearing, certify the record to the Commission, together with his report upon the investigation.

Pursuant to and in accordance with the foregoing, a hearing was set by the hearing examiner for November 30, 1964, in Portland, Oregon, for the purpose of taking testimony in evidence concerning the nature and extent of compliance by Jantzen, Inc., with the said order to cease and desist. Prior to said hearing a prehearing conference was ordered herein for Washington, D.C., on November 23, 1964. During the course of this conference a stipulation signed by counsel for the [62] Commission and for respondent, Jantzen, Inc., and a motion, agreed upon by counsel to close the proceedings before the hearing examiner, were submitted to the hearing examiner and incorporated into the record. On November 23, 1964, the hearing examiner issued his order, as requested by counsel for both respondent and the Commission, cancelling the investigational hearing set for Portland, Oregon, quashing the subpoenas directed to the respondent's officials, excusing their appearance

and closing the record in this proceeding. On January 14, 1965, the hearing examiner's "Report and Certification to the Commission of Record of Investigational Hearing" was duly recorded and filed in the office of the Commission. The Commission having duly considered the report filed by the hearing examiner and the record herein and being now fully advised in the premises, and having accepted the said stipulation entered into by counsel for the respondent and the Commission, makes this its report upon the investigation of the alleged violations of the order to cease and desist.

The Order

The order to cease and desist which issued on January 16, 1959, and which was amended on March 26, 1959, is as follows:

> It is ordered, that respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Report on the Facts

As shown by the stipulation submitted during the prehearing conference of November 23, 1964, respondent acknowledges and admits the following facts:

[63] 1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as

"commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer, Loveman's, 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on [64] proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

CONCLUSION

It is our conclusion, after giving due consideration to the acts and practices of the respondent as evidenced by the admissions in the said stipulation, that the respondent, Jantzen, Inc., has paid advertising or promotional allowances to certain customers as compensation or in consideration for advertising or promotional services furnished by or through such customers in connection with the offering for sale, sale or distribution of respond-

ent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the favored customers in direct violation of the Commission's order to cease and desist issued January 16, 1959, and amended March 26, 1959.

By the Commission.

JOSEPH W. SHEA, *Secretary.*

ISSUED: APRIL 12, 1965.

[65] **Before the Federal Trade Commission**

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Transcript of Proceedings Before Hearing Examiner

November 23, 1964

Met, pursuant to notice, at 10:30 a.m. in Room 7316, 1101 Building, 11th Street & Pennsylvania Avenue, N.W., Washington, D.C., Monday, November 23, 1964.

Before: EDSON P. SCHRUP, Hearing Examiner

Appearances:

Edward G. Gruis, Esq. and *Gerald T. Gregory, Esq.*, Attorneys on behalf of the Federal Trade Commission.

Edwin S. Rockefeller, Esq., (Wald, Harkrader & Rockefeller) 1225 19th Street, N.W., Washington, D.C., Attorney on behalf of Respondent.

[66] PROCEEDINGS

Hearing Examiner SCHRUP. The hearing will be in order. This is a prehearing conference in the matter of Jantzen, Inc., Docket No. 7247, set by order of the hearing examiner for today, November 23, 1964, by agreement of counsel.

COLLOQUY BETWEEN COUNSEL AND HEARING EXAMINER

Mr. Gruis, do you think it might be well for you to make a preliminary statement of what has transpired?

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. Proceed.

Mr. GRUIS. The Commission, by order and resolution dated July 22, 1964 directed that an investigational hearing be held to determine whether or not respondent in this particular proceeding was complying with the provisions of the Commission's order in Commission's cease and desist order in Docket No. 7247, that order dealing with Section 2(d) of the Robinson-Patman Act and the Clayton Act prohibiting the payment, that is, prohibiting the discriminatory payments of promotional allowances to only certain favored customers. The hearing examiner called informal meetings to determine the procedure to be followed in this hearing; and thereafter issued subpoenas on behalf of the Federal Trade Commission requiring two parties to appear and testify in connection with this proceeding.

Thereafter counsel for the respondent met with counsel for the Commission and entered into a stipulation which [67] admitted the identity of the respondent in this proceeding and that it has on several occasions violated provisions of the said cease and desist order in this matter.

This stipulation is signed by counsel on the 17th of November 1964. As a result of this stipulation it now appears unnecessary for a return to be made to the subpoenaes issued in this matter, and counsel for both parties agree that such subpoenaes can be quashed by the hearing examiner.

Moreover, inasmuch as this hearing was directed by Commission's order and resolution, directing that the hearing examiner take evidence and report on facts as to whether or not its order in this matter has been violated, and with such admissions in the stipulation it now appears needless to continue this hearing for the purposes set forth in the Commission's order.

I am prepared at this time to offer to the hearing examiner a copy of the said stipulations, as well as the motion to close the proceedings in this matter.

Hearing Examiner SCHRUP. Do you have anything to say?

Mr. ROCKEFELLER. No, sir. We agree to the stipulation. I would like to say something before we close today, but I simply

confirm what Mr. Gruis has said about our position; that is, we have entered into the stipulation and what he said we agree to.

Hearing Examiner SCHRUP. All right, Mr. Rockefeller.

[68] Now, as I would understand it, before we go to the stipulations, I had heretofore set a hearing for Portland, Oregon to commence on November 30, at which the advertising manager of Jantzen, Inc. was subpoenaed to testify and also a subpoena ducus tecum directed to the vice president of Jantzen, Inc. It is my understanding that you want both of these subpoenaes quashed?

Mr. GRUIS. That is correct, Mr. Examiner.

Hearing Examiner SCHRUP. And the hearings that were set and to commence on November 30 in the Portland, Oregon shall also be cancelled?

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. Then your entire record as far as evidence is concerned in this matter will be presented by the stipulation that you are now offering?

Mr. GRUIS. That is correct, sir.

Hearing Examiner SCHRUP. And you want to make that stipulation as an exhibit?

Mr. GRUIS. I would like to offer it to the Examiner at this time.

Hearing Examiner SCHRUP. And be made a part of the record of this proceeding. This will be Commission's Exhibit No. 1.

Mr. GRUIS. It is just Exhibit No. 1.

Hearing Examiner SCHRUP. How many pages have you?

[69] Mr. GRUIS. I think it has four pages.

Hearing Examiner SCHRUP. This will be Commission's Exhibit 1–A, 1–B, 1–C and 1–D, being a document entitled "Stipulation in the Matter of Jantzen, Inc., a Corporation, Docket No. 7247" consisting of four numbered pages signed by Mr. Rockefeller as attorney for the respondent and by Mr. Gruis and Mr. Gregory as attorneys for the Federal Trade Commission. There being no objection, by agreement of counsel, the stipulation is entered into evidence as Commission's Exhibit No. 1–A, 1–B, 1–C and 1–D.

(The document referred to was marked for identification Commission's Exhibit No. 1-A, 1-B, 1-C, and 1-D and was received in evidence.)

Mr. GRUIS. And is also made a part of the record?

Hearing Examiner SCHRUP. That is a part of the record. That will accompany the record which will be certified by me to the Commission.

Mr. GRUIS. Very well. I have also at this time, unless counsel for the respondent has some additional remarks to make, a motion to close the proceedings in this particular matter.

Hearing Examiner SCHRUP. You can handle it any way that you see fit, Mr. Rockefeller, do you want Mr. Gruis to make his motion and then you either agree or disagree with it, and then if you have a statement to make for the record I will [70] listen to you.

Mr. ROCKEFELLER. We are going to agree to the motion. My suggestion would be that Mr. Gruis go right ahead.

Hearing Examiner SCHRUP. All right.

Mr. GRUIS. At this time, Mr. Examiner, a quash of the motion to close the proceedings in this particular matter, inasmuch as our stipulation is already admitted as Commission Exhibit No. 1, admits the facts which would be established by this hearing of violations in Docket No. 7247, in that order, and also there is consent by the parties herein so far as such admission of facts is sufficient to form the full record in this proceeding for your certification forward to have these hearings closed.

Hearing Examiner SCHRUP. The motion will be filed as part of the pleadings in the case?

Mr. GRUIS. Yes, sir. I will give you a copy now, sir.

Hearing Examiner SCHRUP. Do you agree to this motion?

Mr. ROCKEFELLER. We have no objection to the motion.

Hearing Examiner SCHRUP. This motion of two pages entitled "In the Matter of Antzen, Inc., a corporation, Docket No. 7247, Motion to Close Proceedings before Hearing Examiner," will be filed as part of the pleadings in this case and for the record. The motion will be granted.

Mr. GRUIS. I have one final set of papers, insofar [71] as this is concerned, and it is a report proposed by Commission counsel of the investigational hearing and a certification of the

record to the Commission that we have prepared for your consideration, sir.

Hearing Examiner SCHRUP. You can submit that to me. Have you submitted a copy to Mr. Rockefeller?

Mr. GRUIS. Not yet, no, sir.

Hearing Examiner SCHRUP. I will take that. Give a copy to Mr. Rockefeller. I will give it consideration.

Mr. GRUIS. At this time, sir, ——.

Hearing Examiner SCHRUP. You can hand it to me, please. Let us go off the record.

(Discussion off the record.)

Hearing Examiner SCHRUP. On the record.

In order to avoid any problems about this motion that has been submitted and granted by the Hearing Examiner I will direct the reporter to copy it into the record at this point.

(The document entitled "Motion to Close Proceedings before Hearing Examiner" follows:)

United States of America Before the
Federal Trade Commission

[72]

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Motion to Close Proceedings

BEFORE HEARING EXAMINER

Counsel for the Federal Trade Commission respectfully request that the non-public investigational hearing herein set for November 30, 1964, in Portland, Oregon, be cancelled, and all further proceedings before the Hearing Examiner in this matter be closed. The motion is made pursuant to the attached executed copy of a "Stipulation" by counsel for the Respondent and the Commission, respectively, which:

1. Admits to facts to be established by the hearing which show violations of the Docket No. 7247 order; and

2. Consents to having all further hearings before the Hearing Examiner in this proceeding closed.

For these reasons, the purpose for the investigational hearing on this matter has become moot, and the request is made hereby, with the concurrence of counsel for the respondent, that all further proceedings before the Hearing Examiner be closed, and the said stipulation together with the Examiner's report be certified to the Commission as compliance with its resolution and order of July 22, 1964, directing this non-public [73] investigational hearing.

Dated this ___ day of ____ 1964.

Respectfully submitted,

EDWARD G. GRUIS,
Attorney,
GERALD T. GREGORY
Attorney,
Federal Trade Commission.

(The document entitled "Stipulation" follows:)

United States of America
Before Federal Trade Commission

[72]

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

To: Hearing Examiner ELDON F. SCHRUP:

STIPULATION

Pursuant to the Resolution and Order of the Federal Trade Commission (Commission), dated July 22, 1964, directing an investigational hearing to determine whether or not Jantzen, Inc. (Respondent), has complied with provisions of the Commission's order to cease and desist, issued on January 16, 1959, and modified on March 26, 1959, and in connection with the Hearing Examiner's Order herein, dated October 12, 1964, setting the time and place to commence the investigational hearing, and the subpoenas issued herein by the Hearing Examiner [74] to Donald E. Kennedy, Vice President of Jantzen, Inc., and Bruce Sturm, Advertising Manager for Jantzen, Inc.,

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the following is a true statement of facts:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada, with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as "commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer, Loveman's, 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savey Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in [75] violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

IT IS HEREBY FURTHER STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the above admissions of order violations by respondent make unnecessary:

1. Compliance with the said subpoenas issued herein and counsel for the Commission and counsel for the Respondent agree and consent to having said subpoenas quashed.

2. Continuation of hearings herein to determine whether or not respondent has complied with the said order to cease and desist, and counsel for the Commission and counsel [76] for the Respondent agree and consent to having all further hearings before the Hearing Examiner in this proceeding closed.

Signed this 17th day of November 1964.

JANTZEN, INC.
/s/ Edwin S. Rockefeller
EDWIN S. ROCKEFELLER, Esquire,
Wald, Harkrader & Rockefeller,
Attorneys for Respondent.

/s/ Edward G. Gruis
EDWARD G. GRUIS,
Attorney,
Federal Trade Commission.

/s/ Gerald T. Gregory,
GERALD T. GREGORY,
Attorney,
Federal Trade Commission.

Hearing Examiner SCHROP. Is there anything further?

Mr. GRUIS. I have nothing further at this time.

Hearing Examiner SCHROP. I will hear from you, Mr. Rockefeller.

STATEMENT BY MR. ROCKEFELLER

Mr. ROCKEFELLER. Thank you, sir. Counsel for Jantzen, Inc. that I am, we do appreciate an opportunity to make a statement for the record at this time, so that our agreement to the stipulation with counsel for the Commission and ourselves in a sense an agreement to the motion on the entire proceeding here will not be misunderstood. As will be noted [77] from the stipulation itself we make the admissions contained in the stipulation for the limited purpose of use in this investigational proceeding only, and our understanding is that it will be used for that purpose only. We have agreed to this stipulation of fact (indeed it was upon our initiative that the stipulation was developed) in order to

spare both Jantzen and the government the unnecessary expenses of transcontinental travel and hearings in several cities which might have been unnecessary.

In order to avoid, though, any misunderstanding by Commission counsel or by the Hearing Examiner or by the Commission itself, we do want to say that from our agreement to this stipulation it should not be inferred that Jantzen concedes any legal authority to the Commission in this proceeding. To be more specific, Jantzen does not concede either (1) that what the Commission has designated as an order to cease and desist of January 11, 1959 as modified March 26, 1959, was ever an effective order to cease and desist as provided by the law nor (2) that if the so-called "order" was ever in fact a valid one provided by law, that there is at this time any method provided in law for the enforcement of such "order."

While I believe that we are all in agreement here that by reason of the Commission's conception of this proceeding, as is suggested by the Commission's resolution and order of July 22, 1964, we are agreed I believe that the Hearing [illegible]8] Examiner need not be burdened with questions of this sort, but by the terms of the Commission's direction, shall merely conduct a factual investigation and certify the record of such investigation to the Commission; nevertheless, it may be helpful to state briefly for this record what we mean by each of these questions which I wish to leave open, and I would like to do so briefly at this time.

Hearing Examiner SCHRUP. You may proceed.

Mr. ROCKEFELLER. Thank you, sir.

First of all there is a serious question whether the Commission's so-called "order" to cease and desist issued January 11, 1959 and later modified on March 26, 1959 was ever of any legal effect. The Clayton Act provides specific procedure for the issuance by the Commission of orders to cease and desist. As section 11(b) of the Act provides for complaint and hearing. It provides further that "if upon such hearing the Commission * * * shall be of the opinion that any of the provisions of (Sections 2, 3, 7 and 8) have been are being violated it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such a person an order requiring such person to cease and desist from such violations."

The Commission did not follow such procedure in this case. It made no report in writing and stating its findings as to the facts. Instead the Commission apparently relied on [79] Respondent's waiver of the procedural steps required by the statute. But neither this respondent nor any respondent can by consent confer on the Federal Trade Commission any jurisdiction which the Congress has not granted to it. Respondent could well have concluded, and in complete good faith, that aside from the question of the lawful effect of any such consent "order", the best method to dispose of the earlier proceeding was the informal one offered by the Commission's consent procedure, since what respondent sought was continuing guidance from the Commission on how to comply with the law. (Unfortunately, respondent has not received such guidance. On several occasions it has sought comments from the Commission's staff on its promotional practices, and these were refused.)

Furthermore, there are other reasons than protection of the respondent for which in any Federal Trade Commission complaint proceeding, for which the Congress provided the specific procedures contained in the statute, and for these reasons the Commission must follow the statutory steps regardless of respondent's willingness to cooperate if the Commission is to issue an enforceable order of the type provided by the statute.

Second, even if one were to conclude that the Commission's so-called "order" of 1959 was once as valid as those issued pursuant to the statute's provisions, there does not now exist any provision in law for the enforcement of such orders. [80] Until 1959 Section 11 of the Clayton Act provided an enforcement procedure which the Commission by its resolution of July 22, 1964 is apparently attempting to use here. But in 1959 Public Law 86-107 so amended the Clayton Act as to eliminate the so-called statutory authority for the maintenance of an enforcement proceeding of this sort. New review, finality and penalty provisions replaced the prior enforcement methods, but these have been expressly held to be inapplicable to orders issued before 1959, despite the Commission's own efforts to establish the contrary.

Thus, the present Section 11 of the Clayton Act provides no method for the enforcement of orders issued before 1959, and the Commission itself so recognized at the time of amendment. Further, Section 2 of Public Law 86-107 provides that the amendment shall not apply to "any proceeding initiated before

the date of the enactment of this act under the third and fourth paragraph of Section 11." Since these paragraphs refer only to the enforcement and review proceedings, the exemption does not include such matters as the Jantzen proceeding, which would be an enforcement proceeding initiated after the enactment of Public Law 86-107.

Thus, we wish simply to record here—and we appreciate your courtesy in permitting us to do so—that our position is that the order is not valid and, in any event that there is presently no legal authority for obtaining enforcement of any [81] such so-called "order."

It may also be helpful to mention the following at this time. Should the Commission conclude upon review of this record that it might be appropriate to dispose of this matter by some other means such as under Section 1.21 of the Commission's rules, rather than to force full court consideration of the difficult questions which would be presented were the Commission to seek court enforcement of the 1959 "order."

It will be noted that the last of the violations referred to in the stipulation occurred in 1962. I am informed that these violations were unintended and inadvertent. They were overpayments resulting from poor administration of Jantzen's promotional program by an incompetent clerk. Such violations have been completely eliminated and will not occur in the future.

For a number of years Jantzen has had a written plan for promotional payments which it sent to all accounts, and on which it unsuccessfully sought review and comments from the Commission's compliance staff.

In 1963 Jantzen installed an IBM system for its promotional program, and, in 1964 policing of the program was turned over to the Audit Checking Bureau. Copies of several recent written plans, including those currently in effect, are attached to an affidavit, submitted herewith, of Donald E. Kennedy, Vice President and Assistant General Manager of [82] Jantzen, Inc., which I have here. I am sorry that I did not show it to you sooner. I just got it.

COLLOQUY BETWEEN COUNSEL AND HEARING EXAMINER

Hearing Examiner SCHRUP. Do you want to take a short recess, Mr. Gruis, while you look over the document?

Mr. GRUIS. No.

Mr. ROCKEFELLER. What I would like to do, if I may, is to ask the Reporter to mark the affidavit and then we will offer it to you for this record.

Hearing Examiner SCHRUP. Is there any objection?

Mr. GRUIS. I object. I object to this extent, insofar as a running commentary of how the law evolved concerning the enforcibility of pre-1959 orders of the Commission. I do not raise any question here as to what our propriety is at this proceeding to make any determination on that, one way or another, but I do take strong exception, sir, to introducing into this record now through counsel evidence that seems to go to the heart of the stipulation entered into in good-faith between counsel for the Commission and counsel for the respondent in this particular proceeding. It was not brought to our attention at the time the stipulation was prepared that there were any other factors on the outside other than a straight-forward recognition that such violations had occurred.

For this reason I will certainly request that such commentary be stricken from the record insofar as a coloring or elaboration on the stipulation that has been offered in [83] good-faith.

Hearing Examiner SCHRUP. Is it your position—of course you have not read the stipulation, or rather you have not read the affidavit—is it your position that it contradicts the stipulation?

Mr. GRUIS. No, sir. My position at this stage is that this particular information was not before us at the time that the stipulation was entered into. That stipulation was entered into in good-faith on the assumption, sir, and with the belief that there will not be anything more offered into this record.

Hearing Examiner SCHRUP. I understand your argument, but I suggest this to you, Mr. Gruis, before we proceed further that we take a short recess and you read the affidavit to see what the content of it is.

Mr. GRUIS. Thank you, sir.

Hearing Examiner SCHRUP. We will have a short recess.

(Short recess was taken.)

Hearing Examiner SCHRUP. The hearing will be in order. We will hear from you, Mr. Gruis.

Mr. GRUIS. In the brief intermission I have had an opportunity to go over this affidavit, sir, which contains several statements purporting to be under oath, not only as to the exhibits attached and when they were put into effect, but also their

internal operations and procedures, insofar as [84] handling payments to their retail accounts, insofar as cooperative advertising ventures are concerned which of course is at the heart of this whole proceeding.

Moreover they have also raised the question that their own internal procedures have now been shifted to another agency. This was in January of 1964. And for the purpose of serving as a buffer against their industry.

They have also raised questions with respect to prior dealings with the Commission, insofar as inquiries made throughout the period after the order was issued, but prior to the time that the Commission's cease and desist resolution and order occurred.

I only suggest, sir, this, Mr. Examiner, that obviously this particular resolution and order was not issued by the Commission without any understanding whatsoever of what was happening in this industry, without attempting to dig into the details of prior investigations or prior inquiries of the respondent. That fact becomes an issue if you look at Item Not 7 in this particular affidavit.

In my judgment, sir, this particular information is irrelevant and has no place in this particular proceeding, particularly in light of the stipulation that has been entered into.

Finally we have an inter-office memorandum attached as Exhibit 5 to the affidavit dated November 16, 1964 which [85] was issued sometime after this proceeding started. And, of course, serves as a self-serving statement on how they are complying or what they are doing to comply with the order.

Again, for these reasons, sir, if counsel for the respondent is going to press on the submission of this particular affidavit, as well as insist upon reading it into the record, as to his evidentiary position or his factual position with respect to their past conduct and practices I am going to submit that we have had no opportunity either to cross-examine these people or to by documentary evidence ascertain the accuracy or the factors that have resulted in this type of conduct. If such be the case I am prone at this stage to have the stipulation withdrawn and go ahead with the subpoenas so that we can have the facts determined as a matter of record in this proceeding and not by affidavit.

Hearing Examiner Scanlon. What do you have to say to that, Mr. Rockefeller?

Mr. ROCKEFELLER. I will say this, that I apologize for not getting this into counsel's hands sooner so that he might have had an opportunity to see it. I am distressed at the suggestion whether we offer this or do not offer it or offer to prove the matters that are contained in here that it has anything to do with the stipulation. What we have been trying to do is to move this proceeding, if there is one, along and not just take time on things that are going to end up being [86] proven anyway.

In the stipulation of facts we attempted to meet what it was that counsel wanted out of hearing and we made those admissions, and they stand regardless.

What we hope to do here was simply not to rebut any of the facts contained in the stipulation. In a sense not to discuss the relationship of those facts to the Commission's order, but simply to offer supplementary information to the Commission in the nature of a compliance report, in a sense, so that the Commission can make the most intelligent judgments possible as to what to do with this record, once it gets it.

Hearing Examiner SCHRUP. You—— do I understand from your proffered document, the affidavit, that this is a description of what your efforts have been to comply and how you have formulated new business methods in that nature?

Mr. ROCKEFELLER. I think it is fair to say, and Mr. Gruis can correct me if I am wrong, that this is a very brief summary of the history of Jantzen's promotional program since the violations that are admitted in the stipulation was offered.

Hearing Examiner SCHRUP. The document is in no way a denial of the facts stated in the stipulation?

Mr. ROCKEFELLER. I do not think so. I had no notion that it would be interpreted in that fashion and we do not offer it for that purpose, of course not. We regard it as not [87] at all rebutting the stipulation. In fact and perhaps I was wrong, I intended to think of this sort of material as irrelevant in the stipulation itself and perhaps my concept was wrong. I thought that the stipulation ought to stick to those things that Commission counsel needed to show a violation, that is, several instances of violations. This what they felt or thought they needed, and I understood they thought they needed it and we were able to meet them on that.

A lot of stuff, whether it was inadvertant or what-not, has gone on since or how their present plan is administered, I

thought was really such as did not belong in the stipulation. But I did not see any reason why we should not offer it in the most efficient, helpful fashion at this time or at some time. It seemed to me that this is the time to do it. I do not really want to get in a firmed up adversary posture at this point in this proceeding.

If counsel has a lot of doubt about the stipulation or something, then I just do not know myself. What we could do, I guess—I am not sure where we are procedurally—we could offer this to you in this conference. I suppose we could do that—something that we would like you to see, and he objects to seeing it. If that is where we stand I suppose that if he is going to object, you know, it would be like a formal proceeding, why, I could simply turn around and say that we will just offer to prove all of these things, I offer [88] to prove the following, and I will just read the whole affidavit.

Hearing Examiner SCHRUP. This, as I understand it from the Commission's resolution is not for me to pass on the merits of this. I am just merely to make a report of the record and to certify it to the Commission with the exhibits. It would be my understanding that I am not to evaluate the material, that is for the Commission—is that correct?

Mr. GRUIS. That is my understanding of the order, yes.

Mr. ROCKEFELLER. Mine, too.

Hearing Examiner SCHRUP. That would be my understanding.

Well, do you still have an objection after hearing Mr. Rockefeller's statement?

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. What would you propose in the alternative?

Mr. GRUIS. It appears to me that this question that is being raised now, as I understand Mr. Rockefeller's position, is that he is reserving his position insofar as Commission's jurisdiction, either judicial or to enforce this particular order. If that is the sole question, I had indicated off the record to Mr. Rockefeller, that I will take no exception to reserving his position on jurisdiction. However, I find now, [89] as a part of this affidavit, for example, an effort to show what was done by the respondent in terms of good faith and so on throughout the period that this order was in effect, to obtain some kind of direction or guidance from the Commission, and this goes to the very merits of our

jurisdictional question, and for this very reason I do not see its relevancy in this particular proceeding.

I would submit that if Mr. Rockefeller is so intent upon having the equities of his client's position known the proper time to do that would be to raise that question before the Commission when and if it chooses to challenge its jurisdiction for any future conclusion it should reach with respect to what to do with respect to this record certified by you.

Hearing Examiner SCHRUP. I understand that Mr. Rockefeller's position now is that most of the statement is argument of counsel as to his position.

Mr. ROCKEFELLER. Yes, sir. And I just really wanted to make this statement so that nobody would think later, you know, you just started thinking about this. Really, most of what I have said is just—I just wanted you all to know that maybe at one point these questions would be raised, if necessary. Forgive me for butting in. But I respectfully submit that Mr. Gruis is wrong on suggesting the connection between that matter, that is, my wanting to leave open the question of the validity of the order and the method of enforcement. This [90] is simply offering supplemental information on respondent's current posture as regards the law. I submit to you that this does not rebut in any way the admission of violations, and whether they were inadvertent or not, what they have done since when they are now complying with the law—whether they sought Commission's guidance—those things may be interesting—to go to somebody who is going to decide administratively how to handle it, but they do not abuse the violations, I realize that, and that is why I did not think that they were a proper matter in the stipulation, anyway. I just wanted to offer them in a supplementary way for whoever is going to deal with this matter.

Hearing Examiner SCHRUP. Is it your position, Mr. Gruis, that the Commission would not be entitled to consider that document that has been offered?

Mr. GRUIS. Not as part of this record, because it is not relevant to this particular proceeding. First off, again I submit that this stipulation was entered into. If such factors were going to be made a part of the overall understanding or picture of this particular proceeding they should appear as a part of the record itself, which is now formed by the stipulation itself, not on an ex parte type of introduction of equitable considerations.

Hearing Examiner SCHRUP. You are making it a little difficult for me, Mr. Gruis. As I understand it, Mr. [01] Rockefeller admits that this is in no way an attack on the stipulation. He stands by the stipulation, as I understand it.

Mr. ROCKEFELLER. Yes, sir.

Hearing Examiner SCHRUP. He admits the violations of the order.

Mr. ROCKEFELLER. Yes, sir.

Hearing Examiner SCHRUP. This is, as I understand it, just possible extenuating circumstances explaining what their new method of operation is. Is that correct?

Mr. ROCKEFELLER. What they are doing now. That is basically what we would like the Commission to know—what they are doing now—what is their intention.

Mr. GRUIS. Mr. Examiner, if I may—

Mr. ROCKEFELLER. We are offering this in the best way we can.

Mr. GRUIS. Let us assume, Mr. Examiner, that the record presented by you were certified by you to the Commission now sufficiently satisfies this Commission to move in performance of the enforcement petition to the appropriate court, to finalise the order now outstanding against the respondent in this particular matter. Once this record is certified to the Appellate Court as in past practices the Appellate Court as usually moved on the record made by the Commission alone, not by reassigning the matter to either a referee or an umpire [92] or back to the Commission to take further evidence. The whole purpose of this proceeding or hearing is lost if we are going to have introduced the question of equities or different considerations subsequently occurring to the violations in this matter.

Obviously this is a question for determination that would be before the Appellate Court at this time. Then the very reason it would have, if such questions were to be raised, the Appellate Court in its good judgment could do nothing other than to remind the matter back to the Federal Trade Commission once again to take further evidence in hearings to determine as to whether or not this is an accurate and representative portrayal of what the respondent is doing today. Then for what purpose have we had this hearing, sir? Absolutely none, because we are right back to where we started from.

My position, sir, is that this—Mr. Rockefeller contends this does not go to the stipulation. He is arguing straight restraining

his jurisdictional position. He is arguing the jurisdictional position. Item 7 of the particular stipulation sets out exactly what efforts were made by the respondent during the period at issue here in trying to obtain advice, guidance and what have you. I have not raised until this point, sir, that point, but during this very period his respondent, his client was being investigated by the Commission, and the Commission's policy is that once a client is under [93] investigation or is prone to be in a situation leading to litigation, it does not disclose the results of its investigation or give advice to people, whether they are or are not complying with the law.

Now I would say this very crucial in this particular matter, sir. And for this reason I will continue to press forward to have this affidavit omitted from the record as not being relevant and not being appropriate in the light of the stipulation that has been entered into by the parties.

Mr. ROCKEFELLER. Could I say something?

Hearing Examiner SCHRUP. Yes, sir, you may.

Mr. ROCKEFELLER. There may be some way in which we can get together on this—I hope so. I think that I am not sure really what the disagreement is. We all agree, would we not, that we could have forwarded this affidavit in to the Commission's Secretary and said, "Please ask the Commission to consider this in connection with its investigational hearing in Docket No. 7247," and that would have been objectionable. That would, I gather, be nothing wrong with that. We might have sent a courtesy copy to everybody here. Do you agree to that—that would not have been objectionable?

Mr. CATUIS. I think it would have been objectionable, because if there is a record being made here and you are going to raise such equitable interests or equitable considerations for past conduct, the proper place for that to come up would [94] be during the course of this hearing.

So far as I can see this hearing has been terminated by the stipulation, as well as by the motion to close it. If you choose not to have this particular hearing closed at this time and would like to introduce such facts, and would like to give the government an opportunity to cross examine, to investigate, to review and to consider the matters you are now attempting to put in the record through your argument, then I would say that I am still prone to having our stipulation withdrawn, and let us go ahead with the case.

Mr. ROCKEFELLER. All I want to do is for the Commission to get the facts. We stipulated as to what you wanted, so far as what your subpoenas would show. I would like the Commission to have some supplementary information. If you object to it, I say, Mr. Examiner, why do you not admit it and let him rebut it, if he wants? Let him prove that is untruthful. I do not know—I am not sure that I understand what his position is—relevant or irrelevant—if it is irrelevant, why does he want to rebut it—if it is not, maybe he could help to show that this is not true, if he suspects the truth of it.

Mr. GRUIS. If that is Mr. Rockefeller's final position on this thing, sir, I respectfully request permission to withdraw the motion as to this proceeding.

Hearing Examiner SCHRUP. Is there any other way that [95] this document can come before the Commission, except by incorporating it in this record?

Mr. GRUIS. I would assume that Mr. Rockefeller if and when the Commission concludes on what course to follow with respect to the record certified to them he surely has an opportunity to petition the Commission at any time whatsoever on behalf of his client in this particular proceeding.

Mr. ROCKEFELLER. Maybe the Commission ought to have some of the facts in here in coming to its conclusions as to what it is going to do on this record.

Mr. GRUIS. My position is that they have had no opportunity to answer these facts.

Hearing Examiner SCHRUP. That is what disturbs me a little bit, Mr. Rockefeller. While I expect he is not contradicting or he is accepting the affidavit, I think that maybe counsel would like to ask a few more questions of the people making the affidavit. Is that your position?

Mr. GRUIS. Sir, we agree that entering into this stipulation foreclosed ourselves from challenging the respondent in any other violations of law. True, it has a cut-off date. That cut-off date was supplied by counsel, by the respondent, that he was willing to take these violations up to this cut-off date. We agreed to that, providing we were not going to have this type of procedure. Now he raises the question that subsequent to that cut-off date these people are wonderful [96] people—they have been doing everything they are supposed to do—they have been making every effort to comply with the law. Sir, this completely changes the pos-

ture of this situation now. If this be the case, then I would like to reopen that cut-off date and to see whether or not they have continued with other violations in this industry—whether or not the facts that are in here, the statements in here, are accurate and truthful. This the Commission will not know unless we have such a record before it.

Hearing Examiner SCHRUP. In other words, if I should accept this document for inclusion in the record you would like then to withdraw your motion?

Mr. GRUIS. That is correct, sir. I would not only like to withdraw it, I would like to withdraw the stipulation, too, sir.

Mr. ROCKEFELLER. I certainly object to withdrawing the stipulation. I want to be as cooperative as I can.

Hearing Examiner SCHRUP. It seems to me, Mr. Rockefeller, that we have no quarrel there if you just did not offer this one document.

Mr. ROCKEFELLER. You just deny its submission and I will offer to prove the matters in it. Can we do that?

Hearing Examiner SCHRUP. How can we do that in the absence of any live witnesses?

Mr. ROCKEFELLER. I will either have to get them from [97] Portland, I guess, or maybe we could work out with Mr. Gruis some arrangements. As to the facts that he did not dispute.

Hearing Examiner SCHRUP. Let us take a recess and see if you gentlemen cannot work something out on this. I would like to avoid the expense to both the government and to Jantzen. I do not want to make a hasty ruling on this now—we have got quite a bit of the day left before us, so let us recess until 2 o'clock and see what you can work out.

Mr. GRUIS. All right, sir.

Mr. ROCKEFELLER. I appreciate that.

Hearing Examiner SCHRUP. We will recess this until 2 o'clock this afternoon.

(Whereupon, at 11:20 o'clock a.m., the hearing was in recess, to reconvene at 2:00 o'clock p.m., the same day.)

[98] Afternoon Session

2:00 p.m.

Hearing Examiner SCHRUP. The hearing will be in order. Have you gentlemen resolved your dilemma?

Mr. ROCKEFELLER. If I may speak up, sir, before the recess we had this discussion over an affidavit to which I have referred to in the course of my remarks by Mr. Donald E. Kennedy, of Jantzen, Inc. It is not our intention to offer that affidavit at this time, nor have we anything further to offer at this time.

Hearing Examiner SCHRUP. All right. Then the record will stand as heretofore made, that is, the stipulation has been entered into evidence. And, by the way, rather than taking a chance of losing the stipulation—it is only four pages long—I think that we might well have it copied into the record after the motion, and it will all be together, so will you do that, Mr. Reporter—after copying in the motion, copy in the stipulation.

Now, is there anything further then on the part of Commission counsel?

Mr. GRUIS. Not so far as we are concerned on this record, sir. We have offered you a proposed report.

Hearing Examiner SCHRUP. I have that, yes.

Mr. GRUIS. And I believe we supplied a copy of that to opposing counsel. We would like to have you consider that.

[99] Mr. ROCKEFELLER. Did you do that this morning? Yes, I have it. Thank you. May I ask this question: When the Examiner makes his report will Jantzen and Jantzen's counsel receive a copy of that?

Hearing Examiner SCHRUP. I do not know how that will be handled.

Mr. GRUIS. So far as I can see this is a report from the Hearing Examiner to the Commission. I am led to believe that this is not a matter of public record, although I would presuppose that you would be supplied or furnished with a copy of that. But I do think that this is within the prerogative of the Commission to state.

Mr. ROCKEFELLER. What we might simply do then is to make a request that that be the case. I would not argue it one way or the other. In the resolution the Commission directed that

the rules of practice shall apply to the extent that they are to apply, something to that effect, or words to that effect.

Hearing Examiner SCHRUP. It will be my understanding—maybe I am wrong on this—that this report, of course, is not a public record, but it will be submitted to the Commission.

Mr. GRUIS. Yes.

Hearing Examiner SCHRUP. But respondent could get a copy of that.

Mr. GRUIS. I would suppose that it would be available to them.

[100] Hearing Examiner SCHRUP. That is of this record.

Mr. GRUIS. Yes.

Hearing Examiner SCHRUP. The report will necessarily only encompass the record as made here today. So all I will have before me is the statement of both counsel and what arguments you have made relative to that, in addition the motion has been copied into the record and the stipulation has been copied into the record, and that is the whole of that which will go to the Commission. And instead of having the stipulation marked as an exhibit I think that we will strike the marking on that, and copy it in right into the transcript.

Mr. GRUIS. Fine, sir.

Mr. ROCKEFELLER. Yes, sir.

Mr. GRUIS. It might be that I should call your attention to this, in preparing this proposed report I had no way of envisioning what type of reservation Mr. Rockefeller would choose to make insofar as the jurisdictional question that he has raised during this discussion this morning was concerned and for that reason it may be that you may wish to note such a discussion or such a reservation insofar as your report concerns that.

Hearing Examiner SCHRUP. That is right. It is my understanding that I report to the Commission what has transpired. And, of course, I write no initial decision on this. And as I understand it I make no recommendation. I just merely [101] report it.

Mr. GRUIS. That is right.

Hearing Examiner SCHRUP. And certify the record and the report what has taken place.

Mr. GRUIS. That is correct.

Hearing Examiner SCHRUP. Is that your understanding?

Mr. ROCKEFELLER. That is the way I understand it.

Hearing Examiner SCHRUP. If there is nothing further then——

Mr. ROCKEFELLER. We will simply let stand the request that we be furnished a copy of your report to the Commission.

Hearing Examiner SCHRUP. That will go to the Commission and you can make your request and whatever way the Commission desires to act will be for them to decide.

I will await a copy of the transcript and then having that before me and with a consideration of the motion and all of the rest of the material I will just certify in my report to the Commission what has taken place.

Mr. ROCKEFELLER. Would it be your intention then at this time not to furnish us with a copy at the time?

Hearing Examiner SCHRUP. Well, I do not know whether I would be empowered to furnish you with a copy of it. You will have a copy of the transcript. And my report will merely reflect what appears in that transcript. If you want to make a [102] request after I file my report to the Commission, why you certainly are at liberty to do so. How the Commission will handle it I could not tell you, but as I understand it, this is a non-public investigational hearing and I merely certify this record to the Commission with my statement as to what the record contains with no recommendation, but here is what it is.

Mr. ROCKEFELLER. Maybe if Mr. Gruis had no objection at this time you could furnish us a copy.

Mr. GRUIS. It is my recollection that in the past proceedings of this nature a copy of the Hearing Examiner's report to the Commission is usually made available to the respondent or their counsel in connection with it or whoever appeared at the particular type of hearing. Whether or not because of the non-public nature of this proceeding the Commission would choose to do otherwise I cannot advise you.

Hearing Examiner SCHRUP. I do not know how that would be handled, but let me say this, I will make a report after the transcript comes in to the Commission and that will go to the Secretary's Office, as I understand it.

Mr. GRUIS. That is right, sir.

Hearing Examiner SCHRUP. At that time I can notify you that the report has been filed and you in turn can talk to Mr. Rockefeller.

Mr. GRUIS. And advise him that your report has gone [103] forward.

Hearing Examiner SCHRUP. And then you can speak to the Commission's Secretary and see how they want to handle it.

Mr. ROCKEFELLER. I appreciate that very much.

Mr. GRUIS. I might point out to the Hearing Examiner while it is true that you are certifying the facts forward insofar as to those facts you are obviously having to reach a conclusion—not a conclusion as to whether or not the order has been violated, but a conclusion as to whether or not the facts as set forth indicate that there has been either a discriminatory pricing act or practice insofar as these specific acts or practices are concerned. That, of course, is all contained in the stipulation itself, so that it is easy enough for you to draw such a conclusion.

Hearing Examiner SCHRUP. I will take all of that under advisement when I draft the report and after I have read the transcript. We have a rather lengthy transcript of what has occurred here this morning. I want to read over Mr. Rockefeller's argument and your argument, so that I can properly reflect what has been said to the Commission in summary form. Then, of course, I will have the entire record before me and they will also.

If there is nothing further then from Commission counsel——

Mr. GRUIS. Nothing.

[104] Hearing Examiner SCHRUP. Nothing from you?

Mr. ROCKEFELLER. Nothing further from the respondent.

Hearing Examiner SCHRUP. Then I understand that I shall enter an order cancelling the Portland, Oregon hearing, and quashing the subpoenas and that no returns are to be made on those.

Mr. GRUIS. That is right.

Hearing Examiner SCHRUP. This then today will be the entire record that will be certified to the Commission.

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. You have withdrawn your proposed affidavit?

Mr. ROCKEFELLER. We never offered it. And we do that now.

Hearing Examiner SCHRUP. Fine, all right. Gentlemen, that being the situation I will close the record as of today, and as soon as the transcript is available I will attempt to prepare the report. I do not understand that we probably will have this transcript at a very early date. I am going to go on another matter to Chicago next week and it may well take me a good part of December.

Mr. GRUIS. When may we anticipate the preparation of the report?

Hearing Examiner SCHRUP. As soon as I am free to do so and as soon as the transcript is here. I have been loaned [105] by the Commission to another agency for three possible hearings, two in December in Chicago and one set for January. And how lengthy they will be I do not know.

Mr. GRUIS. I only raise the question with respect to what Mr. Rockefeller and myself have to do as to our future plans of scheduling, so far as when the report goes forward as to our availability to act accordingly.

Hearing Examiner SCHRUP. It will be very doubtful if I will be able to do this in December, but I certainly hope to do so the first opportunity in January.

Mr. GRUIS. Thank you.

Hearing Examiner SCHRUP. It will be available to us, anyway, in several weeks. All right, I will notify you as soon as I sent forward the report, Mr. Gruis, and then you in turn can notify Mr. Rockefeller and Mr. Rockefeller can then consult with the Secretary a gto whatever they want to do on the part of the Commission.

Mr. ROCKEFELLER. Thank you.

Hearing Examiner SCHRUP. All right, we will stand adjournment, gentlemen.

Thank you.

(Whereupon, at 2:10 o'clock p.m. the above-entitled prehearing conference was concluded.)

[65] [Omitted printed page 73 infra]

[105-A] In the United States Court of Appeals for the Ninth Circuit

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC., RESPONDENT

Application for Affirmance and Enforcement of an Order of the Federal Trade Commission—Filed April 22, 1965

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW the Federal Trade Commission, hereinafter referred to as the "Commission", pursuant to the provisions of the Act of October 15, 1914, 38 Stat. 730, as amended, 15 U.S.C. 12 et seq., commonly known as the Clayton Act, and respectfully files this application for a decree affirming and enforcing a certain order to cease and desist issued by the Commission against the respondent, Jantzen, Inc., and its officers, representatives, agents and employees. The proceeding resulting in the [105-B] said order to cease and desist is identified in the records of the Commission as: "In the Matter of Jantzen, Inc., Docket 7247" (55 F.T.C. 1065 (1959)).

In support of this application, the Commission respectfully shows:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as "commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories. Respondent resides and carries on business in this judicial circuit, and this Court therefore has jurisdiction of this application by virtue of the provisions of Section 11 of the Clayton Act, as amended, ch. 1184, 64 Stat. 1126 (1950), as amended.

2. Upon proceedings conducted pursuant to and in accordance with Section 11 of the Clayton Act, the Commission on September 4, 1958, issued and subsequently served its complaint upon the respondent. Thereafter the matter was assigned to a hearing examiner to whom there was submitted on November 25, 1958, an "Agreement Containing Consent Order

To Cease And Desist," which had been entered into between respondent and the attorneys for both parties. [105–C] The Commission, on January 16, 1959, issued, under subsection (d) of Section 2 of the Clayton Act, as amended, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13(d), its said order to cease and desist which reads as follows:

> IT IS ORDERED that respondent, Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Said order to cease and desist was duly served upon the respondent on January 22, 1959, was modified on March 26, 1959, and since that date has been, and is now, in full force and effect.

3. The Commission, having reason to believe that respondent, its officers, representatives, agents and employees might have violated the said order to cease and desist, and that the public interest required an investigation to determine the extent to which such violations might have occurred, resolved and ordered on July 22, 1964, that a non-public investigational hearing be conducted to determine whether or not respondent had [105–D] violated the said order. The Commission further ordered: (a) that one of its hearing examiners be designated to preside at such hearing and to certify the record with his report thereon to the Commission; (b) that respondent have the right of due notice, of cross-examination, and of production of evidence in rebuttal; and (c) that the hearing be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

4. The order of the Commission directing the non-public investigational hearing was served upon the respondent on July

27, 1964, and hearing was set by a duly designated hearing examiner for November 30, 1964, at Portland, Oregon. Prior to the scheduled date for said hearing counsel for the Commission and counsel for the respondent entered into a "Stipulation", in which the respondent admitted that it has failed to comply with the provisions of the said order to cease and desist and consented to having all further hearings before the hearing examiner closed.

After receiving the said stipulation and making it part of the record in this proceeding, the hearing examiner on November 23, 1964, issued his order cancelling the scheduled hearing and closing the record in the said non-public investigational hearing.

[105–E] 5. On January 14, 1965, the examiner certified the record and his report to the Commission, and after duly considering the record certified by the examiner, the Commission on April 12, 1965, made its report entitled "Report of the Federal Trade Commission Upon Its Investigation of Alleged Violations of Its Order to Cease and Desist", in which the Commission found that the respondent has paid advertising or promotional allowances in direct violation of the Commission's said order to cease and desist. The said report of the Commission was duly served upon the respondent on April 13, 1965.

6. Based on the foregoing, the respondent, and its officers, representatives, agents and employees are charged with having failed, neglected and refused to obey the said order to cease and desist.

NOW, THEREFORE, in consideration of the premises and being without remedy save in a United States Court of Appeals where, by virtue of the provisions of Section 11 of the Clayton Act, as amended, matters of this nature are exclusively and properly cognizable, the Commission respectfully applies to this Honorable Court for a decree enforcing its said order to cease and desist issued against respondent, its officers, representatives, agents and employees.

Pursuant to Section 11 of the Clayton Act, the Commission has certified and is filing concurrently with this [105–F] application: (1) a transcript of the record in the original proceeding against the respondent, including the aforementioned "Agreement Containing Consent Order to Cease and Desist," the initial decision of the hearing examiner, and the

order to cease and desist based thereon; and (2) the complete record made at the investigational hearing of the respondent's violations of the said cease and desist order, including the said stipulation, the hearing examiner's report, and the Commission's report and its findings and conclusions thereon.

WHEREFORE, the Federal Trade Commission prays that this Court cause notice of the filing of this application and the filing of the entire record in this proceeding to be served upon respondent, and that the Court affirm the Commission's said order to cease and desist, and that the Court make and enter its decree enforcing the said order to cease and desist and command respondent, its officers, representatives, agents and employees to obey the same and to comply therewith.

Respectfully submitted,

JOSEPH J. GERCKE,
Attorney,
EDWARD G. GRUIS,
Attorney,
GERALD T. GREGORY,
Attorney,
Federal Trade Commission.

Dated this 2nd day of April 1965.

[106] In the United States Court of Appeals for the Ninth Circuit

[Title omitted]

[File Endorsement omitted in printing]

Answer to Application for Affirmance and Enforcement of an Order of the Federal Trade Commission—Filed May 11, 1965

To the Honorable the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Jantzen, Inc., in response to the Application for Affirmance and Enforcement filed in this Court on April 22, 1965, by petitioner the Federal Trade Commission, answers as follows:

1. Respondent denies the averment that petitioner is proceeding in this Court pursuant to the provisions of the Act

of October 15, 1914, 38 Stat. 730, as amended, 15 [107] U.S.C. 12 *et seq.*, or pursuant to the provisions of any other statute, and admits the remaining averments of the unnumbered paragraph on pages 1 and 2 of the Application.

2. Respondent denies the averment that this Court has jurisdiction of petitioner's Application by virtue of the provisions of Section 11 of the Clayton Act, as amended, ch. 1184, 64 Stat. 1126 (1950), as amended, or by virtue of the provisions of any other statute, and admits the remaining averments of paragraph 1 of the Application.

3. Respondent denies that the "full force and effect" of the order issued against it by petitioner on January 16, 1959, includes enforceability in this Court, if it be averred, and admits the remaining averments of paragraph 2 of the Application.

4. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averments that petitioner had reason to believe that respondent, its officers, representatives, agents, and employees might have violated the order entered against it on January 16, 1959, and that the public interest required an investigation to determine the extent to which such violations might have [108] occurred, and admits the remaining averments of paragraph 3 of the Application.

5. Respondent admits the averments of paragraph 4 of the Application.

6. Respondent admits the averments of paragraph 5 of the Application.

7. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 6 of the Application.

8. Respondent denies the averment that matters of this nature are exclusively and properly cognizable, or cognizable at all, in a United States Court of Appeals by virtue of the provisions of Section 11 of the Clayton Act, or by virtue of the provisions of any other statute, and is without knowledge or information sufficient to form a belief as to the truth of the averment that petitioner is otherwise without remedy, and admits the remaining averments of the unnumbered paragraph beginning "Now, THEREFORE" on page 5 of the Application.

[109] 9. Respondent denies the averment that the action of petitioner in certifying and filing, or either of them, a transcript and record, or either of them, was pursuant to Section 11 of the Clayton Act, or pursuant to any other statute, and admits the

remaining averments of the unnumbered paragraph beginning "Pursuant to" on pages 5 and 6 of the Application.

10. As a first defense, respondent avers that this Court lacks jurisdiction to entertain the Application or to grant the relief prayed therein, for the reason that no statute of the United States confers jurisdiction upon the United States Courts of Appeals to entertain an application for the affirmance and enforcement of an order issued by petitioner to cease and desist from violating the Clayton Act, or to affirm such an order, or to enter a decree enforcing such an order, or to command persons against whom such an order has been issued to obey the same or to comply therewith.

11. In support of the aforesaid first defense, respondent avers that the statutory provisions relied upon by petitioner to establish the jurisdiction of this Court [110] were repealed by the Act of July 23, 1959, P.L. 86-107, 73 Stat. 243, and that no other statute of the United States confers such jurisdiction.

12. As a second defense, and in the alternative, respondent avers that this Court lacks jurisdiction to entertain the Application or to grant the relief prayed therein, for the reason that no statute of the United States confers jurisdiction upon the United States Courts of Appeals to entertain an application for the affirmance and enforcement of an order issued by petitioner to cease and desist from violating the Clayton Act, the issuance of which has not followed the procedure prescribed by Section 11(b) thereof, or to affirm such an order, or to enter a decree enforcing such an order, or to command persons against whom such an order has been issued to obey the same or to comply therewith.

13. In support of the aforesaid second defense, respondent avers that the statutory provisions relied upon by petitioner to establish the jurisdiction of this Court [111] confer such jurisdiction only with respect to orders issued after a hearing the testimony in which is reduced to writing and filed in the office of petitioner, and after the making of a report in writing in which petitioner states its findings as to the facts, and that the order issued against respondent by petitioner is not within that class of order, and that no other statute of the United States confers such jurisdiction with respect to the order issued against respondent by petitioner.

14. As a third defense, respondent avers that this Court should deny the relief prayed in the Application, for the reason

that petitioner has unlawfully withheld from respondent its consideration whether the public interest would be fully safeguarded through administrative disposition of this matter on an informal nonadjudicatory basis.

15. In support of the aforesaid third defense, respondent avers that on July 11, 1963, by publication in the Federal Register, 28 Fed. Reg. 7080, petitioner promulgated rules of general applicability, entitled General Procedures, 16 C.F.R. § 1.1 (Supp. 1964), of which Subpart C entitled "Informal Enforcement Procedure", § 1.21 entitled "Voluntary compliance", provides:

[112] "The Commission, when it has information indicating that a person or persons may be engaging in a practice which may involve violation of a law administered by it, and if it deems the public interest will be fully safeguarded thereby, may afford such person or persons the opportunity to have a matter disposed of on an informal nonadjudicatory basis. In determining whether the public interest will be fully safeguarded through such informal administrative action, the Commission will consider (1) the nature and gravity of the alleged violation; (2) the prior record and good faith of the parties involved; and (3) other factors, including, where appropriate, adequate assurance that the practice has been discontinued and will not be resumed.";

that on January 28, 1965, respondent filed with petitioner an "Application for Disposition of Investigation Under Section 1.21" which sought the resolution of the present controversy under the procedures prescribed by Section 1.21 of petitioner's General Procedures; that on April 9, 1965, petitioner issued an "Order Denying Respondent's Request for Informal Disposition" which failed to indicate that petitioner had made the determination required by Section 1.21 but merely recited that "this matter is not suitable for disposition under § 1.21 of the Rules of Practice"; that petitioner thereby either erroneously determined that the procedure for consideration prescribed by Section 1.21 is [113] inapplicable to matters involving violations of orders issued by petitioner to cease and desist from violating the Clayton Act, or discriminatorily refused to apply in this matter the procedure for consideration prescribed for all such matters by Section 1.21; and that petitioner's action was in either event arbitrary, capricious, an abuse of discretion,

otherwise not in accordance with law, contrary to constitutional requirement, power, privilege, and immunity, and without observance of procedure required by law.

WHEREFORE, respondent prays that this Court dismiss petitioner's Application, or, in the alternative decline to enforce the order issued against respondent by petitioner, and grant respondent such other or further relief as may be just and proper.

JANTZEN, INC.,
By
/s/ EDWIN S. ROCKEFELLER,
/s/ JOEL E. HOFFMAN,

Wald, Harkrader & Rockefeller
1225 Nineteenth Street, N.W.
Washington, D.C. 20036

Of Counsel:
PAUL GERHARDT,
Jantzen, Inc.
P.O. Box 3001
Portland, Oregon 97208

[114] United States Court of Appeals for the Ninth Circuit

Before: POPE, JERTBERG & DUNIWAY, Circuit Judges

Order of Submission—January 14, 1966

This cause coming on for hearing, Thomas F. Howder, Attorney, F.T.C., argued for the appellant, and Edwin S. Rockefeller, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

[115] United States Court of Appeals for the Ninth Circuit

Before: POPE, JERTBERG & DUNIWAY, Circuit Judges

Order Directing Filing of Opinion and Filing and Recording of Judgment—February 4, 1966

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[116] United States Court of Appeals for the Ninth Circuit

No. 20021

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

JANTZEN, INC., RESPONDENT,

Opinion—February 4, 1966

PETITION TO ENFORCE AN ORDER OF THE FEDERAL TRADE COMMISSION

Before: POPE, JERTBERG AND DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

The Federal Trade Commission seeks enforcement of a cease and desist order, issued by it on January 16, 1959 (55 F.T.C. 1065) and modified on March 26, 1959.[1] No proceedings relating to the order were begun by either party in this court or any court until the present petition was filed on April 22, 1965. It arises from a proceeding begun by the Commission on July 22, 1964, based upon the Commission's belief that Jantzen might not be complying with the order. At a prehearing conference on November 23, 1964, Jantzen admitted certain violations of the order. At the same time Jantzen took the position (1) that the order is invalid and (2) that, if it is valid, there is no method provided by law for its enforcement. It presents the same contentions here. We hold that we have no jurisdiction in this proceeding, and therefore do not pass upon the first question.

[117] The cease and desist order followed the filing of a Commission complaint that charged violation of Section 2(d) of the Clayton Act, 38 Stat. 730 (1914) as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1964). The Commission was authorized to issue such an order by Section 11 of the Clayton Act, 38 Stat. 734 as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 21 (1958). We therefore refer to it as a "Clayton Act order," to distinguish it from orders issued by the Commission in the course of its duty to enforce the Federal

[1] The order was issued pursuant to a written consent, whereby Jantzen waived any further procedural steps, the making of findings of fact and conclusions of law, and all right to contest the validity of the order.

Trade Commission Act, 38 Stat. 717, 719, § 5 (1914), 15 U.S.C. § 45, as amended. We refer to these as F.T.C. Act orders.

Until 1938, the method of enforcing both types of orders was essentially the same. Section 11 of the Clayton Act, *supra*, as it read when the order here involved was issued, contained 7 paragraphs. The first authorized the Commission to enforce, *inter alia*, section 2. The second set up a procedure for the issuance by the Commission and service of a complaint, for a hearing, and, upon finding violation, for the issuance of a cease and desist order. The third dealt with enforcement of such an order, and read, in pertinent part, as follows:

> "If such person fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may apply to the United States court of appeals * * * for the enforcement of its order * * *. [T]he court * * * shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission * * *. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *." (64 Stat. 1127–8)

The fourth gave the respondent a similar right to petition the Court of Appeals for review of the order, without limit as to the time within which to do so. The remaining 3 paragraphs are not material to our problem.

Section 5 of the Federal Trade Commission Act, *supra*, contained, in its third, fourth and fifth paragraphs, substantially identical provisions regarding F. T. C. orders.

No penalty attached to the violation of either type of order. In order to obtain an enforcing order in the Court of Appeals, [118] a second violation had to be shown. This was done, as in this case, by the Commission's ordering an investigation, appointing a hearing officer, and, usually, holding a hearing.[2] (See the Commission's Rules at 16 C.F.R. § 1.35.) If a violation was found, the Commission then sought enforcement in the Court of Appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. Such a decree had the force of an injunction, and, if thereafter the Commission found further violation, it could bring the respondent before the court for punishment for contempt.

[2] A hearing was not necessary here, because of Jantzen's admissions and stipulation of violation at a pre-hearing conference.

Not surprisingly, this very clumsy and time consuming procedure was severely criticized, and in 1938 the Congress responded by adopting the Wheeler-Lea Act, 52 Stat. 111, section 3 of which (52 Stat. 111–114) amended section 5 of the Federal Trade Commission Act. That section (3) states: "Section 5 of such Act * * * is amended to read as follows: * * *." The amended section contains 12 paragraphs, designated (a) through (*l*). Paragraph (b) retains substantially the same provision for the issuance of cease and desist orders as was contained in the old third paragraph. Paragraph (c), however, is different. It provides for a petition by the respondent to the Court of Appeals for review of the order. The petition must be filed within sixty days from the date of service of the order. The court has similar powers to those conferred by the old section, but with the added power to decree enforcement. In general, the new paragraph (c) is comparable to the old fifth paragraph of the section (38 Stat. 720). The former fourth paragraph, providing for a petition by the Commission, is omitted. Paragraphs (g), (h), (i), and (j) provide for the finality of Commission orders—either when the period in which to petition for review expires or, if there be such a petition, then within a fixed time after the completion of subsequent court and Commission proceedings. All of this is new, as is paragraph (*l*). It subjects violators of final orders to "a civil penalty of $5000 for each violation." This has been since amended (64 Stat. 21, 1950) to provide that each separate violation shall be a separate offense, and, if the violation is a continuing one, each day of its continuance is a separate offense.

[119] The normal rule is that when an Act amends a previous Act "to read as follows" this is as much an express repeal of those provisions which are omitted[3] as it is an

[3] No doubt the Congress could add to each such amending statute a provision that "everything omitted by this Act from the statute (or section) that is hereby amended is hereby repealed," or other words to like effect, but the law does not require such laborious absurdities. See *Heinze* v. *Butte & Boston Consol. Mining Co.*, 9 Cir., 1901, 107 Fed. 165, 167; *United States* v. *Kelly*, 9 Cir., 1899, 97 Fed. 460, 462; *United States* v. *Baker*, 3 Cir., 1961, 293 F. 2d 613, 617–18; *H. Rowe Co.* v. *Crivella*, 8 Cir., 1939, 105 F. 2d 434, 436; *Rowan* v. *Ide*, 5 Cir., 1901, 107 Fed. 161; *Columbia Wire Co.* v. *Boyce*, 7 Cir., 1900, 104 Fed. 172, 174; Endlich, *Interpretation of Statutes* § 196 (1888); Crawford, *Statutory Construction* §§ 304, 305 (1940); 1 Sutherland, *Statutory Construction* § 1932 (3d ed. 1943); 82 C.J.S., Statutes, § 294, pp. 503–4; *cf. Posadas* v. *National City Bank*, 1936, 296 U.S. 497,

express enactment of those provisions which are added and a continuation in effect, rather than a repeal and new enactment, of those provisions which remain unchanged.

No doubt in recognition of this rule, the Wheeler-Lea Act deals with its effect on pending cases. Section 5(a) of the amending Act reads:

> "(a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5(c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act." (52 Stat. 117)

Thus, if the order before us were an F.T.C. order, we would have no problem. The order would be final and enforcible via the civil penalty route, and the Commission would not be here.

But Clayton Act orders were not affected by the Wheeler-Lea Act. They are, however, affected by the so-called Clayton Finality Act, 73 Stat. 243 (1959); 15 U.S.C. § 21 (1964). In substance, it does for Clayton Act orders what the Wheeler-Lea Act did for F.T.C. orders. The technique of amendment is the same. It provides, in pertinent part:

[120] "(a) the first and second paragraphs of section 11 of the [Clayton] Act * * * are hereby redesignated as subsections (a) and (b) of such section, respectively."

It then adds a sentence to the second paragraph, which it designates as (b), dealing with proceedings before the Commission leading to issuance of a cease and desist order. It continues:

"(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written

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502-6; *Murdock* v. *City of Memphis*, 1875, 87 U.S. (20 Wall.) 590, 617; *Stewart* v. *Kahn*, 1870, 78 U.S. (11 Wall.) 493, 502.

petition praying that the order of the commission or board be set aside. * * *" (73 Stat. 243)

It is unnecessary to reproduce the balance of the amended section. It is almost verbatim the same as section 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act. The effect of the statute is to produce a revised section 11 of the Clayton Act, containing 12 paragraphs designated (a) through (*l*), and providing the same method of review at the instance of the respondent only, the same power of the court, the same time limitation, the same rules as to finality, and the same civil penalties for violations as does amended section 5 of the Federal Trade Commission Act.

The former third paragraph which we have quoted in part earlier in this opinion is omitted in its entirety. That is the paragraph which provided for the type of proceeding to enforce, brought here by the Commission, that is now before us. For reasons already stated, we are of the opinion that the amendment, by omitting the third paragraph, repealed it.

Like the Wheeler-Lea Act, the Finality Act contains a paragraph relating to prior cases, which reads:

[121] "Sec. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act." (73 Stat. 245–46)

It will be noted that, unlike the corresponding section 5(a) of the Wheeler-Lea Act, this section does not deal with cease and desist orders issued before its effective date, nor provide for their becoming final within the meaning of the amended Act. It deals solely with proceedings begun in a Court of Appeals, which is the subject to which the former third and fourth paragraphs related. Thus the third paragraph is expressly continued in effect for this very limited purpose, namely, the completion of proceedings for enforcement initiated by the Commission in a Court of Appeals. To us, this is a strong indication that the

Congress knew, and intended, that it was repealed for other purposes. The Finality Act is closely modelled on the Wheeler-Lea Act, which makes the difference between section 2 of the Finality Act and section 5(a) of the Wheeler-Lea Act even more significant.

It is significant, too, we think, that immediately after the adoption of the Finality Act, the Commission itself took the position that existing Clayton Act orders would become final within 60 days, under the new law, just as under the Wheeler-Lea Act, even though the Finality Act does not contain the language to that effect that appears in section 5(a) of the Wheeler-Lea Act. The Court of Appeals for the District of Columbia Circuit refused to accept this view. *Sperry Rand Corp. v. FTC*, 1961, 288 F. 2d 403; *Schick Inc. v. FTC*, 1961, 288 F. 2d 407; *FTC v. Nash-Finch Co.*, 1961, 288 F. 2d 407. In its briefs in those cases, the Commission strongly urged that the former enforcement procedure, which it now seeks to invoke, was no longer in effect.

The Commission's present position is directly contrary to the position that it took then. This does not necessarily mean that its [122] present view is wrong.[4] It relies, first, upon the established rule of statutory construction, that repeals by implication are not favored. That rule, however, does not apply here. As we have already indicated, we think that the repeal in this case was express. (See also, *Sperry Rand Corp. v. F.T.C., supra.*)[5]

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[4] We think that it does mean, however, that we owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute, the adoption of which it helped to procure. (*Cf. FTC v. Mandel Bros., Inc.*, 1959, 359 U.S. 385, 391; *Norwegian Nitrogen Prods. Co. v. United States*, 1933, 288 U.S. 294, 315.)

[5] Of the five cases principally relied upon by the Commission, three are not even closely in point. Each deals with a supposed conflict between two separate statutes or sections, adopted or amended at different times, not with a statute expressly amending a particular statute or section to read in a different way. (*Mercantile Nat'l Bank v. Langdeau*, 1963, 371 U.S. 555, 565-67; *United States v. Borden Co.*, 1939, 308 U.S. 188, 198-201; *Lietz v. Flemming*, 6 Cir., 1959, 264 F. 2d 311, 313.) Two others are more closely in point, but do not involve the effect of the omission, in the amending statute, of a provision that was contained in the same statute before the amendment. They both hold that, insofar as former language is retained

It next urges that the purpose of the Clayton Finality Act was to establish, for Clayton Act orders, the same method of enforcement as was already applicable under the Wheeler-Lea Act to [123] F.T.C. orders. There is no doubt that that was the purpose.[8] There is also no doubt that, as to future orders,

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in the amended section, there has not been a repeal and a new enactment, but only the continuance in effect of the old provisions that are thus retained. (*Posadas v. National City Bank*, 1936, 296 U.S. 497, 506; *Rithols v. Marsh*, D.C. Cir., 1939, 105 F. 2d 937). *Rithols* is the converse of this case. It deals with the Wheeler-Lea Act, and holds that, because the portion of section 5 of the Federal Trade Commission Act authorizing the Commission to issue cease and desist orders was retained in the amended section, there was no repeal and new enactment of that portion, but that it continued in effect. We quite agree, but that does not answer the question here posed.

[8] The title of the Clayton Finality Act reads:

"AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes." (73 Stat. 243)

The House Report accompanying the Act, H.R. Rep. No. 580, 86th Cong., 1st Sess. 4, quoted in *FTC v. Henry Broch & Co.*, 1962, 368 U.S. 360, at 365–66 n. 6, says:

"The Clayton Act, in its present enforcement procedures, permits a person to engage in the same illegal practices three times before effective legal penalties can be applied as a result of action by the commission or board vested with jurisdiction. First, in order to issue and serve a cease-and-desist order initially, the commission or board must investigate and prove that the respondent has violated the prohibitions of the Clayton Act. No provisions of the Clayton Act, however, makes the commission or board's cease-and-desist order final in the absence of an appeal by the respondent for judicial review. At the present time, the Clayton Act contains no procedure by which the commission or board may secure civil penalties for violations of its orders.

"Second, before the commission or board may obtain a court ruling that commands obedience to its cease-and-desist order, it must again investigate and prove that the respondent has violated both the order and the Clayton Act. The jurisdiction of the court of appeals, under the present provisions of Clayton Act section 11, cannot be invoked by the commission or board unless a violation of the cease-and-desist order is first shown.

"Third, enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the court's order. This entails a third hearing before the commission and a review thereof by the court of appeals.

"In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders

that purpose was fully accomplished. But it is equally clear, as we have already shown, that the Congress dealt with orders already outstanding in a different manner in the two Acts. In the case of F.T.C. Act [124] orders, it made the new remedy fully applicable to existing orders. In the case of Clayton Act orders, it did not do this. Instead, it expressly preserved the old methods, but only as to a limited class of such orders.

The Commission says that it has case authority for its position. It cites two cases in which enforcement of a pre-Finality Act order was decreed, without opinion: *FTC v. Pacific Gamble Robinson Co.*, 9 Cir., 1962, No. 18,260, not reported, and *FTC v. Bennus Watch Co.*, 2 Cir., 1962, No. 27,752, not reported. The order was not opposed in either case. These cases are not authority on the question.[7] It also cites two cases involving investigations by it to determine whether pre-Finality Act orders were being obeyed: *Wanderer v. Kaplan*, D.D.C., 1962, CCH Trade Cases, ¶70,535; *Nash-Finch Co. v. FTC*, D. Minn., 1964, 233 F. Supp. 910. Neither of these cases involved the jurisdiction of a Court of Appeals to enforce such an order. Such dicta as they contain is hardly authoritative on the question.

Next, it cites dicta in *Sperry Rand Corp. v. FTC, supra*,[8] and language in *FTC v. Henry Broch & Co., supra*, fn. 6.[9] It is

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issued thereunder are much simpler and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time."

[7] *Brown Shoe Co. v. United States*, 1962, 370 U.S. 294, 307; *Cross v. Burke*, 1892, 146 U.S. 82, 87.

[8] There the court said:

"Enforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered. It follows that the basis for the relief sought, namely, review of the order of November 3, 1958, and of the order of the Commission denying petitioner's motion to modify or set aside the order of November 3, 1958, disappears." (288 F. 2d at 406–7)

[9] The language relied on is:

"In considering *Broch's* challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply to enforcement of the instant order. In conse-

per-[125]fectly clear that the question here presented was not before the court in either case. We have already discussed *Sperry Rand Corp.* The *Broch* case also involved a pre-Finality Act order, issued December 10, 1957. The respondent petitioned for review, and the Seventh Circuit set the order aside on December 11, 1958 (*Henry Broch & Co. v. FTC*, 261 F. 2d 725). The Commission sought and obtained certiorari, and the Supreme Court reversed on June 6, 1960 (*FTC v. Henry Broch & Co.*, 1960, 363 U.S. 166). On remand, the Seventh Circuit modified the order, and affirmed it as modified on November 3, 1960 (*Henry Broch & Co. v. FTC*, 285 F. 2d 764). The Commission again sought certiorari, and again the Supreme Court granted it, and reversed (368 U.S. 360). Thus, when the Finality Act was passed in 1959, the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act. It falls squarely within the language of Section 2 of the Finality Act, and the Supreme Court's language, as applied to it, is clearly correct. As applied to this case, which does not fall within Section 2, the language is not even applicable dictum.

Finally, the Commission asserts that, unless its views are accepted, "forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist would be wiped from the books." It urges that this result is quite contrary to the congressional intent, which was, as we have seen, to strengthen enforcement by the Commission of the Clayton Act. It says that Congress "did not intend to grant amnesty to the almost 400 law violators under order." To these arguments there are two answers, one legal, the other practical.

The legal effect of the Commission's argument is to ask us to insert into the Finality Act something that is not there. In *Sperry Rand Corp., supra*, the Commission asked the court, in substance, to insert into the Finality Act the provisions of sec-

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quence, Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 477-480." (368 U.S. at 364-65)

tion 5(a) of the Wheeler-Lea Act. Indeed, it had tried to accomplish the same thing by press release. The court quite properly declined to do what the Commission asked. (See 288 F. 2d at 406.) What [126] we are now asked to do, in substance, is to insert into section 2 of the Finality Act a provision making it applicable to outstanding cease and desist orders as to which proceedings had *not* been initiated, before the date of enactment, under the third and fourth paragraphs of the former section 11 of the Clayton Act, and this in spite of the fact that the section applies only where such proceedings *have* been initiated. Whether the omission of such a provision was intentional, as it may have been, or inadvertent, as it may also have been, is immaterial. It is not the business of courts, under the guise of construction, to put into a statute what Congress has left out.[10]

The practical answer to the Commission's argument is clear. The Commission is indulging in hyperbole. We do not, by our holding, wipe forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist from the books, nor do we grant amnesty to any law violator, much less to 400. The orders are still there, and still as valid as they ever were. Part of the Commission's function has always been to educate and to persuade. The orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were. There is a presumption that people obey the law; we would suppose that it applies to obedience to FTC orders. The fact that there are 400 orders outstanding from forty-five years of enforcement, none of which the Commission has yet sought to enforce, is somewhat persuasive that the presumption is a valid one.

Moreover, as the Commission points out in its brief, the former enforcement procedures were "somewhat inadequate," since "no meaningful sanctions were provided for enforcement of cease and desist orders." The Commission says:

> "Senator Sparkman, speaking on the floor of the Senate in 1957, commented (103 Cong. Rec. 690): 'In this light it is readily understandable why contempt proceedings to enforce a Clayton Act order have been successful only twice since 1940.'"

[10] *Hanover Bank* v. *Commissioner*, 1962, 369 U.S. 672, 677–678; *Iselin* v. *United States*, 1926, 270 U.S. 245, 251; *Ebert* v. *Poston*, 1925, 266 U.S. 548, 554.

[127] See also fn. 6, *supra*. We cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement,[11] with its requirement that three successive violations be found before one can be punished. (*FTC* v. *Ruberoid Co.*, 1952, 343 U.S. 470.) All that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order. Such an order will give the Commission the full benefit of the Finality Act, and after only two bites at the apple instead of three. Congress may well have felt that this was a better disposition of old cases than to perpetuate the old system as to old orders. This, we think, is the result of what Congress did.

In its reply brief, the Commission suggests, for the first time in a footnote, that the General Savings Statute, 61 Stat. 635 (1947), 1 U.S.C. § 109, preserves the remedy that it seeks.[12] We think not. This proceeding is not based upon a violation that occurred *before* the Finality Act was adopted, but on further violation occurring *after* its adoption in 1960 and 1962. (See *FTC* v. *Ruberoid Co.*, *supra*.) Thus there is not here involved a "penalty, forfeiture or liability" incurred under the former statute. Here, we deal with a statute which formerly conferred jurisdiction on this court, and which, except as to a limited class of [128] cases, of which this is not one, has been repealed. *Cf. De La Rama S.S. Co.* v. *United States*, 1953, 344 U.S. 386,

[11] The Commission, in its brief, says that the system that it here seeks to perpetuate was characterized, in Congressional hearings as "ineffectual; cumbersome; lacking teeth; awkward, slow and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic," and its enforcement of its orders under that system as "handicapped, hampered and weakened," leaving the Commission "poorly equipped to discharge its responsibilities," and leading to "diminution of the intended purpose" of the Clayton Act. We find it not surprising that Congress did not choose to perpetuate such an obviously objectionable system. We also find it somewhat surprising that the Commission is now asking us, by a bit of judicial legerdemain, to recreate it.

[12] "§ 109. *Repeal of statutes as affecting existing liabilities.*

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *."

390. Moreover, the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method. *Cf. United States* v. *Obermeier*, 2 Cir., 1950, 186 F. 2d 243, 251–55, *cert. denied*, 1951, 340 U.S. 951.

The petition is dismissed for want of jurisdiction.

[129]

United States Court of Appeals for the Ninth Circuit

No. 20021

FEDERAL TRADE COMMISSION, PETITIONER

vs.

JANTZEN, INC., RESPONDENT

Decree—Filed February 4, 1966

Before: POPE, JERTBERG AND DUNIWAY, Circuit Judges

This cause came on to be heard upon the petition of the Federal Trade Commission, filed April 22, 1965 to review an order of the Federal Trade Commission issued by it on April 12, 1965. The Court heard argument of respective counsel on January 14, 1966 and has considered the briefs and transcript of record filed in the cause. On February 4, 1966, the Court being fully advised in the premises handed down its decision.

In conformity thereto it is hereby ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the petition to review in above cause be and hereby is dismissed for want of jurisdiction.

[130] Clerk's Certificate to foregoing Transcript Omitted in Printing

[1311] Supreme Court of the United States

No. ——

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, PETITIONER

vs.

JANTZEN, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—MAY 5, 1966

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 1, 1966.

W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of May, 1966.

[1312] Supreme Court of the United States

No. 310

OCTOBER TERM, 1966

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1966